De Laudibus Legum Angliæ

A TREATISE IN COMMENDATION

OF THE

LAWS OF ENGLAND

BY

CHANCELLOR SIR JOHN FORTESCUE

WITH TRANSLATION BY

FRANCIS GREGOR

NOTES BY

ANDREW AMOS

AND A

Life of the Author

BY

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PUBLISHERS' NOTICE.

In carrying out our plans for the republication of some of the most noted "Legal Classics," Sir John Fortescue's "De Laudibus Legum Angliæ" was selected as the third of our series, and the edition by Amos, published in 1825, was fixed upon for republication. Just as we were about putting it into the printers' hands, we fortunately heard of Lord Clermont's privately printed edition of Fortescue's Life and Works, in 2 vols. royal 4to, printed in 1869, a detailed description of which will be found on page liv. After some correspondence we learned that the edition was a limited one—120 copies—designed for family friends and important public libraries. On being informed of our intended republication, and of our desire to refer to it for comparison, Lord Clermont generously sent to us a copy of this sumptuous work, for our use in the preparation of this edition, and then to be presented to the Public Library of Cincinnati. We were thus enabled to make a careful examination and comparison of the text and translation of the two editions of *De Laudibus*. As the result, we have the pleasure of offering to our readers Lord Clermont's carefully corrected revision of both text and translation, with Amos' valuable notes. We have also prefixed Lord Clermont's Life of his ancestor, which will be found more complete than any heretofore published.

Contents.

LIFE OF SIR JOHN FORTESCUE.

Sir John Fortescue, Chancellor to King Henry the Sixth, was the second son of Sir John Fortescue of Winstone, in South Devon, who was present at the battle of Agincourt, in 1415, and who was afterward appointed by Henry the Fifth governor of the fortress of Meaux, in the Province of La Brie, in France. He was younger son, by Elizabeth, daughter of Sir John Beauchamp of Ryme, in Dorset, of William Fortescue of Winstone, twelfth in descent from Sir Robert le Fort, surnamed Fort-escu, or Strong-shield, who came from the Côtenin, in Lower Normandy—that cradle of Anglo-Norman families—with William the Conqueror, and fought in the battle of Hastings. Several pedigrees have made the Chancellor to be the grandson of Sir John, the Governor of Meaux, and son of Sir Henry Fortescue, Chief Justice in Ireland; but they are certainly in error, because a careful comparison of the periods during which the three persons in question held their public appointments, will show that it is scarcely possible that Sir Henry and the Chancellor[1] could have stood to each other in the relation of father and son, and because still stronger, and what for the present purpose may be called conclusive evidence, is found in a contemporary document,[2] where it is incidentally mentioned that "Herry Fortescue, late Justice in Ireland," was the son of John Fortescue, and that he had a brother Richard; and this last being also brother of the Chancellor, it follows that he and Sir Henry were likewise brothers.[3]

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[1] Prince, Worthies of Devon.

[2] Proceedings in Chancery, reign of Elizabeth, and from Richard II. to Richard III. 3 vols., folio, 1830. Vol. ii., p. xviii.

[3] There is, besides, a deed of 14 Henry VI., quoted in the Biog. Britt., vol.

Of the place of his birth there is no positive mention. Prince[1] says that it was "most likely Norris, near South Brent, in Devonshire." This was a seat belonging to his mother, who was daughter and heiress of William Norris of Norris, where her ancestors had been settled for eight generations.[2]

Neither do we know the precise time of his birth, although, by a passage in his work, "De Laudibus Legum Angliæ," it is possible to get within three or four years of it.

He there says, in describing the degree of Sergeant-at-Law:[3] "Quare ad Statum et Gradum talem, id est servientis ad legum, nullus hucusque assumptus est qui non in prædicto generali legis studio sex decim annos ad minus antea complevit." And in the chapter before, he says that the students are, for the most part, youths. Now, Fortescue was made a Sergeant in Michaelmas Term, 1430, and consequently, must have become a student of the law, at the soonest, in the year 1414, so that if he was then eighteen years old, he was born in 1396; if twenty, as is perhaps more likely, then 1394 was the year of his birth.

Bishop Tanner says that he was educated at Exeter College, Oxford, and he was called to the Bar at Lincoln's Inn.[4] Of the manner of his life and studies we have no account, unless his description of law-student life in his Treatise be taken from his own experience. In that case Fortescue was one of a hundred or more young men, all "gentlemen by birth and fortune, spending, at least, eight and twenty pounds a year each"[5] (an allowance equal,

iii. 1986, which is a grant by Henry Fortescue to John, his brother, and to Isabella, the wife of said John, of all the messuages, lands, and tenements of John Fortescue, *father of said Henry*, in Overcombe, Efford, and Alston, in the parish of Holboughton, in Devonshire.

[1] Prince, Worthies of Devon.

[2] Pole. Collections for Devon, p. 300.

[3] De Laudibus, chap. 50.

[4] Campbell, i. 371; Tanner, Bib. Britt., London, 1748, p. 293; Biog. Britt. iii. 2087.

[5] Hallam, Middle Ages, chap. ix., when he estimates the value of money now at sixteen times that in the time of Henry VI.

by Hallam's computation, to more than £400), with a servant to wait upon him, and joining in the studies and amusements thus detailed. "Both in the Inns of Court and Inns of Chancery is an Academy where the students learn singing and all kinds of music, dancing and other such accomplishments (which are called Revels), as are suited to their quality, and such as are usually practiced at Court; out of term the greater part apply themselves to the study of the law. Upon festival days, after the services of the church are over, they employ themselves with study of history, sacred and profane. There every thing which is good and virtuous is to be learned; all vice is discouraged and banished, so that Knights, Barons, and the greatest nobility of the Kingdom often place their children in the Inns of Court, not so much to make the laws their study, as to form their manners, and to keep them from vice. Bickerings and disturbances are almost unknown. The only punishment is expulsion from the Society, more dreaded than imprisonment and irons by criminals, because he who is turned out of one Society is never received into another; thus there is constant harmony, and the greatest friendship and freedom of conversation."

This picture, although it may be somewhat overcolored, describes a manner of life and a society well calculated to produce the profound lawyer, and the Christian statesman, which this young law-student became, and whose character this education of the Inns of Court must have helped to form.

In the year of Henry the Sixth, 1425, he was made a Governor of Lincoln's Inn; next year again, and a third time in 1429, 7 Henry the Sixth. In the two first entries[1] in Dugdale's "Origines Judiciales," he appears as "Fortescue Junior," which looks as if his elder brother, Sir Henry, was also a member of that Inn.

Of his career, until he became a sergeant, nothing is told; how soon or how late he got into practice, by what means, or to what extent. It is likely that he took that degree soon after his stand-

[1] Dugdale, Origines, p. 249; De Laudibus, chap. 50.

ing at the bar had qualified him for it, if we may judge by the number of years he lived afterward, and the date of his promotion, which was in Michaelmas Term, 1430.[1] Of the particulars of an investure with the White Silk Coif, the badge of his new rank, we have his own account: "The Lord Chief Justice of the Common Pleas, by and with the advice and consent of all the Judges, is wont to pitch upon, as often as he sees fitting, seven or eight of the discreeter persons, such as have made the greatest proficiency in the general study of the laws, and whom they judge best qualified. At the time and place appointed, those who are so chosen hold a sumptuous feast, like that at a coronation, which is to continue for seven days together; neither shall any one of the new-created serjeants be at a less expense suitable to the solemnity of his creation, than two hundred and sixty pounds and upwards, whereby the expenses in the whole which the eight will be at, will exceed three thousand two hundred marks, to make up which, one article is, every one shall make presents of gold rings, to the value, in the whole, of forty pounds (at the least) English money."

"I very well remember," he says, "that when I took upon me the state and degree of a serjeant-at-law, my bill came to fifty pounds."

He then proceeds to tell us how this large sum, no less than eight hundred pounds of our present money, if we are to follow Hallam, was disposed of.

"Each serjeant at the time of his creation gives to every prince of the blood, to every duke, and to each archbishop who shall be present at the solemnity, to the Lord High Chancellor, and to the Treasurer of England, to each a ring of the value of twenty-six shillings and eight pence; to every earl and bishop, to the Keeper of the Privy Seal, to each Chief Justice, to the Chief Baron of the King's Exchequer, a ring worth twenty shillings; and to every

[1] Dugdale, Chron. Series, p. 61; Biographia Britannica (but Foss, Lives of the Judges, Vol. IV., gives Michaelmas, 1429, for the sergeant's creation). The Year-Book may clear up this point.

other lord of Parliament, to every abbot, and to every prelate of distinction, every worshipful knight there and then present, to the Master of the Rolls, and to every justice, a ring to the value of one mark; to each Baron of the Exchequer, to the Chamberlain, and to all the great men at Court then in waiting on the King, rings of a less value in proportion to their rank and quality, so that there will not be the meanest clerk, especially in the Court of Common Pleas, but that he will receive a ring convenient for his degree. Besides, they usually make presents of rings received of their friends and acquaintance.

"They give also liveries of cloth of the same price and colour, which are distributed in great quantities, not only to their menial servants, but to several others, their friends and acquaintance, who attended at the ceremony of their creation."

It is probable that Fortescue's marriage took place during this period of his life. He certainly was a married man in the end of 1435, or early in 1436, as appears by the deed of 14 Henry VI., already referred to, where "Isabella, wife of said John," is mentioned; and it is likely that he had then been so for some two or three years, for his only son, Martin, who died in 1472, left at his death a son and heir aged twelve years.

Sir John's wife was Isabella Jamyss, daughter and heiress of John Jamyss, Esquire, of Philip's Norton, in Somerset, on the borders of Wiltshire, near Bath. In the "Patent Rolls"[1] of 21 Henry VI. is "an inspeximus and confirmation of a grant by the Prior of the Carthusian order of Hinton (Hinton-Charterhouse) to John Fortescue and Isabella his wife, and Margery, mother of Isabella, of messuages in Philip's Norton," the grant being dated the Tuesday after the feast of St. Hilary, 19 Henry VI. (*i. e.* January 14 to 21, 1441, St. Hilary Day being on the 13th January), and the inspeximus bearing date Westminster, the 12th of February, 21 Henry VI. (1443.)

The document recites that the said Isabella was the daughter of Margery, who was wife of John Jamyss, of Philip's Norton.

[1] Patent Rolls, 21 Hen. VI., pt. ii., No. 34.

The estate thus acquired remained in the Chancellor's family until it was sold, in the year 1725, to Mr. Frip, by Hugh Fortescue, Earl Clinton.[1] The Fortescue arms may still be seen in stone on a house in the village of Norton St. Philips.[2] By the same lady he acquired lands in Wilts.[3] Thus, "John Fortescue, Knight, and Isabella his wife, granted by deed, dated Nov. 21, 35 Hen. VI. (1456), to Robert Brigge, the reversion of a tenement at Bradford, Wilts."

The statement made by several authors that the Chancellor's wife was Elizabeth, daughter of Sir Myles Stapleton, is an error, that lady being the second wife of Sir John Fortescue of Punsbourne, so given in an inquisition post-mortem, taken at Royston, in Hertfordshire, in July, 1501, upon the death of the said Sir John, who was nephew to the Chancellor, and died July 28, 1500. Elizabeth Stapleton was the widow of Sir William Calthorpe, Knight.[4]

The issue of the marriage was an only son, Martin, styled in some documents Sir Martin, and at least two daughters. Martin married, in 1454,[5] Elizabeth, daughter and heiress of Richard Denzile, Esquire, of Wear-Giffard, who inherited that property, as well as the estates of Filleigh (now Castle Hill) and Bucklane-Filleigh, near Torrington. He died before his father. Sir John's daughter, Elizabeth, was married about 1456,[6] to Edmond, son of Thomas Whalesburgh, Esquire, of the county of Cornwall.

The other daughter, Maud, married Robert Corbet, son of Sir

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[1] Letter to the author from Earl Fortescue, Nov. 6, 1866.

[2] Information from Mr. Jackson, Librarian at Longleat, August, 1866.

[3] Notitiæ and Pedigrees concerning the Family of the Fortescues, Brit. Mus. Add. MS. 15, 629, f. 62 *b*.

[4] Inq Post-mortem, 16 Hen. VII., No. 3, Brit. Mus., and Notitiæ and Pedigrees of Fortescue Family, Brit. Mus. Add. MS., from Peter le Neve (Norroy), and Bloomfield's Norfolk, ix. 222, ed. 8vo.

[5] The marriage settlement, seen by the author of Stemmata Fortescuana, is dated September 10, 33 Henry VI. (1454.)

[6] Exchequer of Pleas, 34 Henry VI.

Robert Corbet, a very unfortunate alliance, as appears from what Bloomfield, in his "History of Norfolk," thus relates:[1]

"Maud, daughter of Sir John Fortescue, Lord Chief Justice, who had the Lordship of Dunham Parva in the 33d of Henry the Sixth (1455), married Robert, son of Sir Robert Corbet. He forsook her, and re-married Lettice, daughter of John Shirewood of Coventry, and left issue by this Lettice, Robert and Alice. His first wife, Maude, from whom he was never divorced, surviving him, upon his death, Roger Corbet, Esquire, his brother, second son of Sir Robert aforesaid, made an entry into his lands as next and legal heir; but Lettice aforesaid having re-married Talboys, a servant to Thomas Rotherham, Archbishop of York and Chancellor of England, Roger sued him in the Spiritual Court of Canterbury, and Talboys procuring a prohibition, Roger appealed to Rome, and a suit was directed by Archbishop Rotherham to Roger of 'ne exeat regnum.' Upon this, Roger was laid up in the Court two years, but being enlarged in the last year of King Edward the Fourth (1483), died presently after.

"It appears that Maud, the first wife of Robert, had a jointure of twenty marks per annum out of this manor. She retired, and lived in the Nunnery of Helveston, in Bedfordshire, and died there."

After Fortescue's promotion to be sergeant, the Year-Books are no longer silent concerning him, but make frequent mention of his arguments.

His practice was large, and his knowledge of English law conspicuous. He acted upon some emergencies as Judge of Assize, in which capacity he went the Norfolk Circuit in 1440 and 1441 (18 and 19 Hen. VI.)

In the latter year, in Easter Term, he was appointed a King's Sergeant;[2] and when the death of Sir John Hody made a vacancy in the Chief Justiceship, he, without having passed through

[1] Bloomfield's Norfolk, Vol. IX., p. 479 (8vo edition).

[2] Dugdale, Chron. Series, p. 63: "Johannes Fortescu serviens Regis ad Legem, Pasch. 19 Hen. VI."

the intermediate step of a Junior Judge, was, on the 25th of January, 1442 (20 Hen. VI.), raised to that high place.[1] Here his reputation as a great judge was soon and permanently established, and here he continued for more than eighteen years to pronounce those judgments and expositions of the laws which are still quoted with respect.

The late Lord Campbell, a great admirer of Fortescue, says of him that "he discharged his duties as Chief Justice with extraordinary ability, and seems to have been one of the most learned and upright men who ever sat in the Court of Queen's Bench;"[2] and in another place he calls him "one of the most illustrious of the Chief Justices, for ever to be had in remembrance for his judicial integrity;"[3] and Fuller, in his "Worthies of England," joining him with Chief Justice Markham, his immediate successor, says:[4] "These I may call two Chief Justices of the Chief Justices, for their signal integrity; for though the one of them favoured the House of Lancaster, and the other the House of York, in the titles to the Crown, both of them favoured the House of Justice in matters betwixt party and party."

The Chief Justice was knighted upon his appointment, or soon after. I find him styled "Miles" first in June, 1443.[5]

We have to regret the almost complete absence of notices of his life during the eighteen or nineteen years of his Chief Justiceship. None of his correspondence has come down to us, and his name occurs but seldom in the scanty memorials of contemporary events not purely military, which have survived the troublous times that ensued.

The first reference to him that I can find is in the Paston Let-

[1] Dugdale, Chron. Series, p. 62.

[2] Campbell, Lives of Chancellors, Vol. I., p. 376.

[3] Campbell, Chief Justices, Vol. I., p. 141.

[4] Fuller, Worthies, Vol. II., p. 571, article "Markham" (8vo edition).

[5] Will of John Cheddar of Cheddar, in Dodsworth MS.

ters the year after his promotion, in a letter written at his desire to a brother Judge, Sir William Paston:[1]

"*To my right worthy and worshipful Lord, William Paston, Justice, in haste:*

"Please it your good Lordship to weet, that the Chief Justice of the King's Bench recommendeth him to you, and is right sorry of the matter that is cause of your none coming hither, but he will do all he can or may for you.

"He hath had a sciatica that hath letted him a great while to ride, and dare not yet come on none horse's back, and therefore he hath spoken to the Lords of the Council, and informed them of your sickness, and his also, that he may not ride at these next assizes to East Grinstead; and though those assizes discontinue pur noun veno dez Justicez, he hopeth to be excused, and ye also.

"As for the remanent of the assizes, he shall purvey to be there by water; and Almighty Jesu make you heyle and strong.

"Written right simply, the Wednesday next tofore the Feast of the Purification of our Lady, at London.

"By your most simple servant,

"JAMES GRESHAM.[2]

"LONDON, *Wednesday*, 30th of January, 1443. 22 Hen. VI."

The absence at that period of any carriage-road between London and the Assize town of one of the home counties, is worthy of remark. All who were unable to walk, or to ride on horseback, could only reach the Sussex coast by a sea-voyage!

In this year we find him sitting as a Privy Councillor in "The Starred Chamber," on several occasions.[3] And serious tumults

[1] Paston Letters, Letter VI., Vol. III., p. 27. Sir William Paston, born in 1378, made a Judge of the Common Pleas in 1430, died in 1444. (See Preface to Fenn's edition.)

[2] He appears to have been Sir John Fortescue's Secretary.

[3] Proceedings and Ordinances of the Privy Council, Nicholas, Vol. V. cxxiv.–cxxv., etc.

having occurred at Norwich on account of certain ecclesiastical exactions, a special commission was issued to him and others, in the month of March, for the trial of the rioters. The event is thus noticed in the Minutes of the Privy Council:

"The Commons arose, and would have assaulted and fired the Priory, and have destroyed the Prior of the place, &c. Whereupon the King sent thither the Chief Justice, John Fortescue, the Earl of Stafford, and the Earl of Huntingdon; and sitten them in Sessions, at the which were many of the City there indited, and the Prior also, and also the City lost their liberties, and franchises, and freedoms that they had afore, and all the City siezed into the King's hand. . . . And the Chief Justice Fortescue and Westbury Judge, declarenden all their demenyng at Norwich."

In the Parliament, held at Westminster in 1444[1] (23 Hen. VI.), on the 25th of February, Fortescue was named as one of the "Triers of Petitions."

He was re-appointed in each Parliament until that of July, 1455, inclusive.

His conduct in the case of Thomas Kerver attracted notice[2] at the time, and deserves to be mentioned to his credit. Kerver had been imprisoned for some offense in Wallingford Castle, when the King pardoned him, and wished him to be released; but Fortescue, to whom the King sent his commands to issue his writ for the purpose, considered that he had no right or legal power to do so, and refused to comply. Bentley conjectures that this refusal arose from his disapproval of the favor shown to Kerver, or from doubts as to its legality, and admires his bold and upright behavior. Henry had recourse to his Chancellor, to whom he addressed this letter:

[1] Rolls of Parliament, Vol. V., p. 66, etc.

[2] Bentley, Excerpta Historica, folio 390.

Letter from Henry the Sixth to the Chancellor, commanding him to issue his writ to the Constable of Wallingford Castle, to deliver Thomas Kerver from imprisonment.

BY THE KING.

Right Revend fader in god, Right trusty and Right welbeloved We grete you wel. And how be hit that we now late sent unto oure trusty and welbeloved Knight John ffortescu oure chief Justice charging hym to deliver oute of oure Castel of Walyngford in our behalve Thomas Keruer, which by oure comaundement hath long time been in ward in ye prison of oure said Castel, yet natheless ye said John ffortescu hath do us to understande, that he hath no pouair so to do in any wise. Wherefore we wolling for certain causes and consideracons especially moeving us, the forsaid Thomas to be in brief tyme delived out of ye said prison without any firther delay, charge you yat ye do make oure writte in due fourme directed unto the Counestable of said Castel or his depute comaunding him straitly to deliver ye forsaid Thomas out of ye forsaid prison, and to souffre him to goo at large. And yat ye faille not hereof as we truste you. Lating you wite yat it is oure ful wille yat ye shal so do. And we wol theese our Ires to be unto you souffisant warrant & discharge in yat behalve. Yeven under our signet at Pottern the XXV day of Aoust the yere of our Reyne XXV.

To the Right Reverend fader in god our Right trusty and Right welbeloved tharchbishop of Cant' our Chauncellier of Englande.[1]

There is a letter in the Paston correspondence,[2] written between 1450 and 1454, by one T. Bocking to William Wayte, containing the following curious sentence:—

"The Chief Justice hath waited[3] to have been assaulted all

[1] Miscellaneous Records in the Tower.

[2] Paston Letters, vol. iii., p. 135.

[3] "Waited" here means "expected."

this sev'night nightly in his house, but nothing come as yet, the more pity, &c., &c. An oyer and determiner goeth into Kent, and commissioners my Lord the Duke of York, Bourchier, my master, that will not come then de proditionibus, &c., &c., but Kent prayeth them to hang no man when they come."

It would seem that the writer was, like his master, a follower of the York party, which may account for his savage language about Fortescue the Lancastrian. The editor of the Paston Letters surmises that the commission may have been to try some of the persons implicated in Cade's rebellion.

In the year 1457, Sir John purchased from Sir Robert Corbet the reversion, after the decease of "Joyes or 'Jocosa,' late wife of John Grevyle, Esquier," of the manor and appurtenances of Ebrington or Ebberton, near Campden, in Gloucestershire, for the sum of one hundred and fifty-one pounds. This estate, forfeited by his attainder, was granted to Sir John Brug, who died seized of it in the eleventh year of Edward IV.,[1] 1471 or 1472, a short time before its restoration to the Chancellor, in whose family it has ever since continued, and is now the property of Earl Fortescue.

An inquisition[2] into Fortescue's property, taken after the Act of Attainder, shows that he had acquired, besides Ebrington, estates in Wiltshire at Kingston-Deverell, Ironbridge, and Chippenham, at some period of his legal career. To these must be added a portion of his father's estate in South Devon, which he inherited at his death, between 1435 and 1437, described in the Inquisition as Combe in Holbeton, Overcombe, Nethercombe, Efford, and Alstone.

The salary attached to his Chief Justice's place was granted to him by patent,[3] bearing the same date with his appointment, that is to say, January 25th, 20 Hen. VI. (1442.) It was 180 marks,

[1] Rudder's Gloucestershire, p. 434.

[2] See Inquisition at Amesbury, 7 Ed. IV., among Inq. Post-mortem, Brit. Mus., and Appendix.

[3] Patent Rolls, 20 Hen. IV., Membrane 10.

equal to £150 per annum, together with 106 shillings, and 11 pence farthing, and one-eighth of a half-penny, for a robe with fur trimming, at Christmas, and sixty-six shillings and sixpence for a robe and its lining at Whitsuntide.

Not many days later, namely, on the 6th of February, the King grants him, by patent, a tun (dolium) of wine annually for his life, to be given to him by the Chief Butler of England from the port of Bristol.[1]

And a second yearly tun was added by a new patent of the 23d of May, 1443, also for his life, in consideration "of the good service which the said John Fortescue performs and may hereafter perform for US."

These two tuns[2] are specially exempted in the Act of Resumption of Grants, passed in the 34th Henry VI. (1455), by the following clause: "Provided also that this Act of Resumption be not prejudicial, nor extend to the Grant which we have made by our Letters Patentes to John Fortescue Knight, of two Tun of Wine to be taken yearly in the Port of London for the term of his life."

An addition to his salary of forty marks per annum[3] was made in the year 1447 by a patent of the 22d of March, which recites that this grant shall be for his life, and that its object is to enable him to keep up his state more becomingly, and to meet his expenditure while in his office of Chief Justice, and also that expenditure which it will be fitting that he should make when he shall have ceased to hold the said office—a thoughtful precaution.

Fortescue continued to act as Chief Justice until the dethronement of Henry and the success of Edward made it impossible to do so longer. He remained long enough[4] to have his Yorkist

[1] Rymer v. pt. i., p. 120. A tun of wine contains 63 gallons or 84 dozen of quart bottles.

[2] Rolls of Parliament, vol. v., p. 317.

[3] Patent Roll, 25 Hen. VI.

[4] Cambpell, Chief Justices, i. 141.

partisans indicted before him, and was not actually superseded until Sir John Markham was created by Edward IV. his Chief Justice, on the 13th of May, 1461,[1] more than two months after the battle of Towton, and after Edward's accession to the throne.

He cannot, however, have sat at Westminster later than the first half of 1460, for the last record of his appearance in the Year-Books is as having presided in the Court of King's Bench in Easter Term, 1460 (38th of Henry VI.),[2] although there were two or three cases reported in the King's Bench or Exchequer Chamber in the three following terms.[3]

His legal career was now over forever—not through the weight of his years, although these were little short of seventy, nor, as he soon proved, from any loss of vigor of mind or body, but because he had determined to follow the shattered fortunes of his royal master, and had taken his part as a Lancastrian adherent.

Henry, set free from captivity by the defeat of the Yorkists at St. Albans, on the 17th of February, 1461, had rejoined his Queen and her forces, and retired with the army toward the Northern Counties where the strength of his party lay. Here Fortescue accompanied them, and not long after he had exchanged the dignified calm of a Judge's life for the tumult of the camp, he was found bravely fighting for the falling cause on the 29th of March, in the bloody battle of Palm Sunday,[4] between the villages of Towton and Saxton, in Yorkshire. "Here," says Holingshed, "in a fair plain field,"[5] Edward, with 60,000 followers, approached Henry, with 48,000, "about nine of the clock in the morning. When each perceived the other they made a great shout, and at the same instant there fell a small sleet or snow, which, by the violence of the wind which blew against them, was driven into the faces of King Henrie's armies,

[1] Dugdale, Orig. Chronica Series, p. 66, claus. i., Ed. IV.

[2] Foss, Lives of Judges.

[3] Selden, Preface to De Laudibus, folio xlvi., note.

[4] Rolls of Parliament, vol. v., p. 479.

[5] Holingshed, iii. 278.

so that their sight was somewhat dimmed, and they shot their shiefe-arrows all to loss, for they came short of the Southern men by threescore yards." In spite of this bad beginning, "the deadlie conflict continued ten hours in doubtful state of victorie, uncertainlie heaving and setting on both sides. The battle was sore foughten, for hope of life was set aside on either part, and taking of prisoners proclaimed a great offense, so every man determined to vanquish or die in the field; but in the end King Edward so courageously comforted his men, that the other part was discomfited and overcome, and fled to Tadcaster bridge to save themselves; in the mid-way whither is a little brook called Cocke, not very broad but of great deepnesse, in which, what for haste to escape, and what for fear of their followers, a great number was drowned. It was even reported that men alive passed the river upon dead carcasses, and that the great river of Wharfe whereunto that brook doth run, and all the water coming from Towton was coloured with blood. The chase lasted all night and the next day, the Northern men often turning upon their pursuers, to the great loss of both sides, whose total loss is set down at upwards of 36,000 slaine."

From this great blow, the Lancastrians never recovered; Henry, with Queen Margaret and the Prince, fled to Berwick-upon-Tweed, and Fortescue with them, as we learn from Leland, who writes that "King Henry, the Prince, the Queen, the Duke of Somerset, Henry Duke of Excestre, the Lord Roos, Sir John Fortescue Chief Judge of England, and Tailboys Erle of Kyme, being at York, and hearing of this, fled first to Newcastle and then to Berwick, delivering it to the Scots." [1]

We find Fortescue still on the English side of the border in the end of June, when, in attendance on King Henry, he was engaged in an encounter with the Yorkists at Brauncepeth, near Durham, and at Ryton, near Newcastle. Soon after these events he retired with Henry to Edinburgh.

[1] Leland, Collectanea, vol. ii., p. 499.

At this period of Fortescue's career, in which his appointment as Lord Chancellor to Henry VI. must, in one sense or another, have taken place, we may stop to consider what claims he has to be enrolled amongst those who de facto filled the office of Chancellor of England. That he was Chancellor to Henry during his exile is a fact which has not been disputed; but it is held by most writers that he never was Chancellor within the realm of England. We shall see how far this statement is accurately true. It must, I think, be at once admitted that if Henry's legal power to appoint a high officer of state ceased upon the proclamation of Edward as King of England, it is highly improbable that he ever received a valid appointment, for Henry was in the power of his enemies until the battle of St. Albans, on the 17th of February, 1461, and certainly could not until that day have superseded George Neville, who was up to that time nominally his Chancellor, although really under the House of York, by the appointment of another person. There remained then only the short space of fifteen days to the 4th of March, passed in tumult and confusion, in which Fortescue could have had the seals, before Henry's reign is generally held to have ceased. There is no entry on the records, concerning the Great Seal, between Neville's creation, on the 25th of July, 1460, and the 10th of March, 1461, when he took the oaths to the new King.[1]

There was, however, a period of above four months from the battle of St. Albans, during which Henry was still in England, and in possession of some, though but a small part of his dominions; for he is charged in the Act of his Attainder with levying war in his own person against Edward, in Durham,[2] on the 26th of June, 1461, and here, as we have seen, Sir John Fortescue was with him. It seems very likely that one of his first acts upon regaining his freedom was to create a Chancellor, who, by sealing his writs with the Great Seal, could help to keep up the appearance of kingly power, when but little of its substance

[1] Campbell, Lives of Chancellors, i. 370.

[2] Rolls of Parliament, v. 478.

remained to him; and the very presence in his retinue of the venerable and famous Lord Chief Justice of England would in itself naturally suggest such appointment. That Henry had a Great Seal after his expulsion, we know from Queen Margaret's instructions to Ormond in Portugal, where it is expressly mentioned. Thus Fortescue may well have been Henry's Chancellor in England, and while there was still some part of the country which acknowledged his rule.

This probability seems to have escaped the notice of some of his biographers, whose views of his claim to rank as Chancellor I proceed to give.

Spelman, in his list of Chief Justices, says of him: "Notior in ore omnium nomine Cancellarii, quam Justiciarii, diu tamen functus est hoc munere, illo vix aliquando. Constitui enim videtur Cancellarius, non nisi a victo et exulante apud Scotos Rege Henrico Sexto, nec referri igitur in archiva regia ejus institutio, sed cognosci maxime e libelli sui ipsius inscriptione."

Selden, in the preface to his edition of "De Laudibus," writes:[1] "As to the promotion of Sir John Fortescue, there is no doubt but that he was Chancellor in some sort. But when, or to what purpose, whether even during the actual reign of Henry VI., or so as to exercise his office in Westminster Hall, may be a question. He accompanied the King into Scotland, and then, *or before in England*, he might be made Chancellor, as Sir Edward Hyde was in Charles the Second's exile."

The writer in the Biographia Britannica lays stress upon the title of "Chief Judge of England,"[2] given to Sir John in the passage from Leland, quoted above, saying that "this plainly shows that he was only Chief Justice when he attended his master into Scotland," he, like others, assuming that the retreat to that country took place at once; but adds, "as from the time that he left King Henry there, he never saw him any more, there seems to be no room to doubt that he received the Great Seal

[1] Fortescue, De Laudibus, by Selden, 1737, folio, Preface, p. xlvi.

[2] Biog. Britt. Edition 1750, vol. iii., p. 1990.

from that King there, *as soon as it was known* that George, Bishop of Exeter, afterwards Archbishop of York, continued to bear the title and execute the office of Lord Chancellor by the authority of King Edward."

If this be correct, Fortescue was for some months Chancellor in England, and the absence of his name from the Roll of Chancellors is also accounted for.

Lord Campbell,[1] who writes of him with veneration, "suspects that he had only the titular office of Chancellor in partibus," but, nevertheless, says that he feels called on to include him in his series of English Chancellors; while many of the older writers, as Bale,[2] copied by Pits, Fuller,[3] Pole,[4] and Tanner,[5] style him Chancellor of England, without any expressions of doubt or qualification.

Sir John remained in Scotland with Henry, upon his retirement there from Berwick, the Scotch King having, either from pity for his misfortunes, or in return for Henry handing over to him that town, allowed him to take up his abode in Edinburgh, where he was lodged in the Grey Friars,[6] a residence which his love of solitude selected.

Here Margaret's energies were soon employed in trying to engage the King of France to interfere in behalf of his nephew, her husband, and she prepared to sail for that country with the Prince, but the death of Charles VII. at this time seems for the present to have stopped her.

Henry, meanwhile, continued in Scotland, the Chancellor employing his leisure in composing those "wrytings sent out of Scotteland," which he was destined afterward to explain or refute to King Edward's satisfaction. He tells us that he was

[1] Campbell, i. 370.

[2] Bale, Scriptures Mag. Britt. (8th century.)

[3] Fuller, Worthies of England.

[4] Pole, Collections for Devon.

[5] Tanner, Bibl. Britt. Hib.

[6] Guthrie, Hist. Eng., vol. ii., p. 692.

"Chief Councillor to the King in Scotland," and therefore must have had much to say to the various negotiations for his master's restoration, carried on with his party in England, as well as with foreign Potentates.

In November of this year, Edward the Fourth called his First Parliament at Westminster. Both Houses, entirely submissive to the new King, who indeed left them no liberty to oppose him, declared the three last sovereigns no better than usurpers,[1] and, having annulled many of their acts, proceeded to pass a most sweeping Act of Attainder against Henry the Sixth, his Queen, and his son, the Dukes of Somerset and Exeter, with 148 Lords, Knights, Priests, and Esquires;[2] among these was Sir John Fortescue. The acts of treason with which he is charged are the battle of Towton, on the 29th of March, and the rising or skirmishes at Brauncepeth and Ryton on the 26th of June.

The estates which the Chancellor lost by his attainder were soon after granted to adherents of the conquering party, his manor of Ebrington being given, as before mentioned, to Sir John Burg,[3] and other lands to John Lord Wentock,[4] a zealous Yorkist.

It was not until the spring of the next year that Margaret went to France. She sailed from Kirkcudbright in April, 1462,[5] with four ships and a small attendance, landing in Brittany, where the Duke gave her an honorable reception[6] and twelve thousand crowns. She then proceeded to her father's Duchy of Anjou,[7] and finally to the Court of Louis the Eleventh at Chinon.

The new King was not warm in his support of his kinswoman's cause, but was at last prevailed on by her entreaties,

[1] Statutes at Large, vol. i., 1 Ed. IV., cap. i.

[2] Rolls of Parliament, vol. v., p. 463.

[3] Atkins, Gloucestershire, p. 425. See Biog. Britt., p. 1994.

[4] Rolls of Parliament, v. 581.

[5] William of Wyrcester's Chronicle, A. D. 1462.

[6] Lingard, v. 176.

[7] Guthrie, Hist. of England.

and by the offer of Calais as a security, to lend her twenty thousand crowns, and to allow Pierre Brezé, the Senechal of Normandy, to follow her fortunes with two thousand men.

After a stay of several months, Margaret sailed from France, and after many adventures on the coast of Northumberland, where she landed some troops, who were forced by the English to re-embark, with great loss, she, with the remains of the expedition, reached Berwick. Here Henry and the Prince joined her from Edinburgh, and a descent upon England was organized, when Bamborough, Alnwick, and other strong places fell into the hands of the Lancastrians,[1] who were joined by the Duke of Somerset and Ralf Percy, and by many of the inhabitants of those parts. But when the Earl of Warwick arrived in the North with twenty thousand men, and King Edward with as many besides, the issue of the struggle was no longer doubtful; and on the 17th of May, 1464, the Lancastrians were totally and finally defeated at Hexham, Henry himself escaping with difficulty. He fled once more to Scotland;[2] but, after a time, urged, no doubt, to leave that country by the Scotch King, who had made terms with Edward the Fourth, he went into Lancashire and Westmoreland, where the people were attached to his cause and kept him hid; but, being at last discovered, he was taken prisoner in June, 1465, and committed to the Tower, where he remained for seven years.

It would appear that Margaret and the Prince took refuge in the strong fortress of Bamborough Castle, still in the hands of their party.

Fortescue, who had accompanied the Royal party in this campaign, was now finally parted from his unfortunate master. He remained with the Queen and Prince at Bamborough; and, when it was determined that they should proceed to the Continent, he resolved to attend them, and, after a short delay, embarked in their company at Bamborough, with some other persons of note.

[1] Holinshed (4to), vol. iii., p. 282.

[2] Rapin.

Their names are preserved by William of Worcester,[1] viz: The Duke of Exeter, Sir John Fortescue, Sir Edmund Mundeforde, Sir Edward Hampden, Sir Henry Roos, Sir Thomas Ormonde, Sir Robert Whytyngham, Doctor John Morton, Doctor Robert Makerel, with many besides of lower degree, whose names are not recorded, to the number of two hundred persons. They landed at Sluys, in Flanders, then part of the dominions of the Duke of Burgundy, and were hospitably received by the Count of Charolois, his eldest son, who took the Queen to Bruges, providing for the wants of the party with great liberality, and afterwards led them to his father's court at Lisle, where they remained for some time, the Duke giving a thousand crowns for their maintenance. They possibly, however, outstayed their welcome, for Rapin relates, from Philip de Comines, that the Royal exiles here endured great misery, and that the Duke of Exeter, before his rank was known, was seen by De Comines following the Duke of Burgundy's carriage barefoot.[2] The next journey was to Lorraine, where Margaret's father, René of Anjou, titular King of Jerusalem and Sicily, was Duke. This prince, who had inherited from his father the adjoining duchy of Bar, succeeded to that of Lorraine in right of his mother, Isabella, only daughter of the former Duke. He recieved his daughter and grandson with kindness, and gave them and their followers a retreat in Barrois, or Berry, as the old authors write it. The place assigned to them was St. Mighel, a small town on the right bank of the Meuse, which there flows through a narrow valley shut in by high hills. The English exiles were lodged in the fortress.

It was probably at this time that Fortescue, desiring to forward Henry's cause, made the journey to Paris, to which he presently alludes. We know, however, that before the end of the year he was settled at St. Mighel. A letter from him to the Earl of Ormond, in Portugal, is extant in the Imperial Library in Paris, which will be read with interest, as showing the straits and pov-

[1] William of Wyrcester's Chronicle.

[2] Rapin, i. 600.

erty to which he was reduced. It is very illustrative of the times and the circumstances:

Letter from Sir John Fortescue to the Earl of Ormond, containing directions how to proceed in his mission into Portugal, to obtain assistance for Henry VI., at that time dethroned by Edward IV.

Ryght worshipfulle and myne especially belovyed lord, I recommaunde me to you; and it is so that in the feste of the Concepcioune of our Lady I resceyvide, at Seynte Mighal in Barroys, frome you a lettre writyne at Porte in Portingale, on Monday nexte before the feste of Seynte Mighel, to my right singuler comfort, God knowith. Of which lettre, the quene, my lord prince, and alle theire servantes were fulle gladde, and namely of youre welfare and escapynge the power of your ennymyes. And it is so that the quene nowe desirethe you to do certayne message from here to the king of Portyngale, of which ye moure clerely understande here entente by an instructione, and also by here lettres, whiche here highnesse now sendithe to you by the berer hereof. Wherfore I write nowe nothynge to you of tho materes.

And as touchynge the sauf conducte whiche ye desire to have of the kynge of Fraunce, it were gode that ye hadde it. And yet yf his hyghnesse do to us nothynge but righte, the quenes certificat, which we sende to you herewith, shulle be to you swerte sufficiant. Noethelesse I counseille you not to truste fermely theruppone, and thereby to aventure you to passe thorghe his lande, for he hathe made appeyntements withe oure rebelles, by whiche it semythe he hathe not alway entended to kepe the peace and triwes which he made withe us; but yet I knawe no cause that he hathe to breake hit, nor hetherto he hathe not takene nor imprisoned any mane of oure partie by any soche occasione. And Thomas Scales hath sente me worde that he hopithe to morre gete, by the meanes of my lord Senyschalle, a sauf conducte for you. And elles my lord of Kendale canne fynde the

meanes how ye mowe passe soche parties of Gyane, Langdok, and other, whereas most juperte is, as ye shulle be in no perille. My lord of Somerset that now is and his brother come frome Britayne by Parys thorghe Fraunce unto the quene with vj. horses, and no maun resonyd ham in there way. And so didde I from Parys into Barroys; but yet this is no verrey surety to you. Wherefore your aune wysdome most gyde you in this case, not trustynge myne advise, that knawe not the maner of this contrey as ye do; but yet I wote welle that a bille signed with my lord Senyschalle is hande shall be sufficiant unto you to passe thorghe oute alle Fraunce.

My lord, herebuthe withe the quene the dukes of Excestre and Somerset, and his brother, whiche, and also sir John Courtenay, buth descended of the house of Lancastre. Also here buthe my lord Prive Seal, master Johne Mortene, the bishope of Seynte Asse, sire Edmond Mountford, sir Henry Roos, sir Edmond Hampdene, sir William Vaux, sir Robert Whityngham, and I, knightes, my maister youre brother, William Grymmesby, William Josepe, squiers for the body, and many other worshipfulle squiers, and also clerkes. We buthe alle in grete poverte, but yet the quene susteynethe us in mete and drinke, so as we buthe not in extreme necessite. Here highnesse may do no more to us thanne she dothe. Wherfore I counseille you to spend sparely soche money as ye have, for whaune ye come hither ye shulle have nede of hit. And also here buthe maney that nede, and wolle desire to parte with you of youre aune money; and in all this country is no maune that wolle or may lene you any money, have ye niver so grete nede. We have here none other tythinges, but soche as buthe in youre instruccione.

Item, yf ye fynde the kynge of Portingale entretable in our materes, sparithe not to tarie longe withe hym. And yf ye fynde him alle estraunge, dispendethe not your money in that contrey in idilce; for after that ye came hithere, hit is like that ye shulle be putte to grete costes sone uppone, and peradventure not long tarie here.

Item, my lord Prince sendithe to you nowe a lettre writyne with his awne hande, and another lettre directed to the kynge of Portyngale, of whiche I sende nowe to you the double enclosyd hereyn.

I write at Seynt Mighel in Barroys, the xiij. daye of Decembre.

Your servant,

J. FORTESCU.

My lorde, by cause we knew not verrely the kynge of Portingale is name, the quene is lettre hath no superscripcione, nor the lettre fro my lord Prince; but ye moure knowe ham also welle by the seales as by this, that in the syde where the seal is sette of the quenes letter is writyne thise wordes, "Pro Regina," and in like wyse in my lordes lettre is writyne, "Pro Principe." And I sende to you hereyn soche wordes of superscripcione as ye shalle sette uppone bothe lettres, whiche wordes buthe writyn withe the hande of the clerk that hath, writyne both lettres.

Item, the berer hereof had of us but iij. scutes for alle his costes towardes you, by cause wee hadde no more money.

(*Dorso*) To the righte worshipfulle and my singulerly belovide lorde, the Erle of Ormonde.

The King of Portugal, at this time, whose name was not known to Fortescue, was Alfonzo V.; his grandmother was Philippa, daughter to John of Gaunt, the Duke of Lancaster,[1] who married Joam I. of Portugal in 1403.

The Emperor of Germany was Frederick III., married to Eleonora, daughter of King Edward of Portugal. The King of Spain was Henry IV., married to a Portuguese Infanta; he was also related to Henry VI. of England in the same degree as his wife, his grandmother being Catherine, another daughter of the Duke of Lancaster.

The Earl of Ormond, above mentioned, was John, the sixth of

[1] Hume, iii. 548.

that title. He was present with his elder brother, James, fifth Earl of Ormond and Earl of Wiltshire, at the battle of Towton, and was in consequence attainted. He succeeded nominally to his brother's Earldom of Ormond, upon the beheading of the latter by the Yorkists at Newcastle (May 1, 1461), and forthwith fled to Portugal.

We find Fortescue, after a stay of some months at St. Mighel, again engaged in pressing his master's cause upon the French King. Henry sent him his credentials as one of his ambassadors from Edinburgh in March, and he soon after accompanied to Paris the famous Lancastrian Jasper Tudor, Earl of Pembroke, Queen Catherine's son by her second husband, Owen ap Tudor, and therefore half-brother to Henry.

There is some mention of this journey in a dispatch from the authorities at Rouen to their King, announcing the arrival of Pembroke and "the Chancellor of England," from which it appears that Louis, who wished to come to terms with Edward IV., had already thought it wise to withdraw the right of free access to him and his country, which Henry's friends had enjoyed, by requiring that all Englishmen should be furnished with a safe conduct before they were allowed to pass through France.

Sir John had joined Pembroke in Flanders, and there learning the need of some protection, they had recourse to the friendly Count of Charolois, who gave them letters to smooth their way to Paris.

Sir John was the bearer of a special letter of introduction for himself from King Henry the Sixth to his cousin of France, which testifies to the esteem in which he held the person and services of his "Friend and loyall Chancellor."

Louis was not moved by the representations of the ambassadors, or by Margaret's appeals, to take any steps for Henry's restoration. He had made a truce with Edward, and although his leanings were always toward the Lancastrian party, he must have looked upon that cause as already lost, when the news reached him about this time of Henry being taken prisoner and

sent to the Tower. There was therefore nothing left for Fortescue but to return to Barrois, and there, with his fellow-exiles, to watch the course of events in England.

For some time, probably for several years, nothing happened to raise the hopes of the Lancastrian exiles. Queen Margaret was untiring in her applications to foreign monarchs, and in her endeavors to stir up her friends in England, and the Chancellor was largely engaged in consultations and correspondence, with the same object. Some of his expressions would seem to imply that he attended the Queen and Prince in their journeys to the Court of Louis. He also undertook the education of Edward, at least so far as to instruct him in the laws of his country and the duties of a King of England.

"Fortescue," says Amos, "conceived that he was pursuing a judicious course for securing the future happiness of the English nation in forming the character of the heir apparent to the throne, and acquainting him with the duties of a patriot king—a task which, in late times, even Hampden did not look upon as derogatory to his talents or incompatible with his independence."[1]

Two treatises remain drawn up, as he tells us, with that intent: the first in order of time was entitled "De Naturâ Legis Naturæ," divided into two parts; the second, and more famous, the "De Laudibus Legum Angliæ." This last was thrown into its present form, if not composed, during the latter part of his stay in Barrois; for he speaks in it of the time when the Prince left England as long ago, when he was too young to recollect much about his own country. As to the "De Naturâ," we know that at least the second part of it was written in Scotland, being "the Latin Book" to which Fortescue refers in his "Declaracioun on Writings from Scotland."

While Fortescue was thus at once engaged in instructing the Prince how to reign over Englishmen, and in leading the schemes and negotiations which, as he hoped, were finally to enable his

[1] Amos, Introduction to De Laudibus.

pupil to put into practice the maxims impressed upon him, events of the most important kind were approaching in England. The Lancastrians, although humbled and silenced, were still very numerous. On more than one occasion emissaries from Queen Margaret had been found trying to excite the people to insurrection.

Edward the Fourth, by his marriage with Elizabeth Woodville, and still more by the honors and favors which he heaped upon her relations, had disgusted the leading nobility, and in particular the great family of the Nevilles, with the great Earl of Warwick at their head. This powerful and arrogant lord[1] became so discontented that he stirred up a rebellion in Lincolnshire, and when it was put down by the King, took his departure to France, with the Duke of Clarence, whom he had found means to persuade to join the malcontents against his brother the King, and who had married one of Warwick's daughters. His object was to injure Edward with that monarch, who, indeed, was always inclined to the House of Lancaster, and was now displeased with Edward for giving his daughter in marriage to the Duke of Burgundy, and concluding with him a treaty of commerce.

Here were hopes for the Lancastrian exiles.[2] The most powerful subjects in England changing sides in their favor, and the King of France, offended by their rivals, ready to take any opportunity to thwart them that might offer itself. Sir John was quite alive to the advantages to be gained from these changes; accordingly, we find his pen in full activity, laying before Louis everything that should be urged to show what he risked by supporting Edward, and what he could not fail to gain by a vigorous interference for Henry.

He presented to Louis a memoir upon Edward's claim to the crown of England, and the pretensions which he put forward to that of France also—refuting them both, as we are told, and

[1] Holinshed, 1468, iii. 290.

[2] Ibid.

"showing that he has no right whatever to either." His object, no doubt, was to frighten Louis. This document he put into the shape of a book. He writes again to show that peace with England must always be uncertain so long as Edward reigned, while, on the other hand, if Henry was in power, the two nations would be ever in amity—giving, as we are told, his reasons at length.

After some time longer he alarms the French King by telling him of Edward's late declaration in Parliament, announcing his resolution to invade France in person with a large army; to prevent which calamity, Louis is told how he may keep Edward employed at home, by becoming himself the aggressor, for, with even a small army, he would so encourage the Lancastrians that they would speedily drive Edward away, and restore his master, and then only could a lasting peace be made between the two kingdoms; for means might be found to induce Edward to submit quietly to what he could not help. We are not told what these were, but his plan may have been that which was afterward actually made the subject of an Act of Parliament during Henry's renewed reign, namely, to allow the Crown, on failure of Henry's heirs male, to go to the House of York, setting aside for this purpose the daughters of the House of Lancaster; for Fortescue had written and argued in "De Naturâ" against the succession of women to "supreme government." He asks to be allowed to lay before Louis himself, or before some one in his confidence, other more secret matters, which it would not be prudent to commit to writing.

It would seem that by this time (1470) Louis was thoroughly alive to the necessity of stirring up discord among the English, to prevent them from interfering with his schemes. He probably never meant to do more than this, and therefore desires Clarence and Warwick,[1] with their ladies, to be hospitably entertained at their landing-place, and invites them to his Court at Angers and Amboise. Queen Margaret, upon hearing of their arrival, repaired likewise to Amboise with the Prince, and we find that

[1] Lingard.

Fortescue accompanied them, and took a forward part at the negotiations with Louis. He laid a memorandum before the French Government, inviting the King to join Margaret's advisers in bringing about a marriage between the Prince of Wales and the Lady Anne Neville, Warwick's daughter, representing "that by means of such marriage the said Earl of Warwick and his friends would be secured, and the said Earl would have the chief management of the kingdom of England, and that with his support and that of the loyal subjects of King Henry, the Queen and Prince would have more ready entrance into their kingdom, and thus would a peace, firm and lasting, be secured between the countries." Margaret had now met Warwick, the chief author of all her misfortunes, and the greatest enemy of her cause. Their common interest, however, soon reconciled them to act together, and Louis encouraged the union. The match so much desired by Fortescue was agreed to, and "first to begin with all," says Holinshed,[1] "for the sure foundation of their new entreatie, Edward, Prince of Wales, wedded Anne, second daughter to the Earle of Warwick, which ladie came with her mother into France." Thus "the brother of King Edward became brother-in-law of the Lancastrian Prince, and the Earl of Warwick was equally allied to both houses."[2]

The other terms of this reconciliation were these:[2] That the Duke of Clarence and the Earl of Warwick should endeavor to restore Henry to the throne, and that the Queen should promise, with an oath, to leave the government of the kingdom in their hands during the King's life, or the minority of the Prince, his son—a concession recommended by Fortescue.

Louis promised to furnish some money and troops, and to convey Warwick to England with his fleet.

Sir John, at this time, must have become sanguine of success, for he lays proposals before the King of France on matters of

[1] Holinshed, iii. 295.

[2] Rapin, i. 608.

detail relating to trade between France and England, proposing that a market for English wool should be established at Rouen or Calais, and that English merchants at Bordeaux and Bayonne should have the same privileges that the city of London had granted to Flemish traders—namely, the right to appoint an alderman and the keeping of one of the city gates. This also is referred to in the State Paper.

The march of events now became rapid. Warwick landed in England unopposed by Edward, who had gone to the North to quell a rising there; proclaimed Henry VI., and had reached Nottingham unopposed, and with an increasing force, when Edward, alarmed by the defection of a part of his army, fled from the kingdom, and crossed into Holland. Warwick and Clarence entered London in triumph on the 6th of October (1470), released Henry from the Tower, and replaced him on his throne.

There was great joy among the exiles when they heard of this sudden revolution. Louis ordered public thanksgivings and rejoicings, and Margaret was received in Paris as Queen of England. It seems strange that she and the Prince should not have at once joined the restored King. She did not, however, embark at Harfleur until the 24th of March, when Edward, with a small force, raised in Holland,[1] had already re-entered the kingdom at Ravenspur. The popular tide had turned, and the treacherous Clarence had gone over to his brother with 12,000 men.

On Easter Sunday, the 14th of April, the armies of the two parties met at Barnet, and the Lancastrians, after a bloody battle, were entirely defeated, Warwick himself was slain, his brother also, and almost all the leaders, and the reinstated Henry was taken prisoner, and once more lodged in the Tower.

It was on that same Easter Sunday that Margaret and the Prince, after nearly three weeks spent in the voyage, landed at Weymouth, and Sir John Fortescue with them. Their dismay on hearing the overwhelming news was great, but they were cheered by the arrival of the Duke of Somerset and Jasper Tudor, Earl

[1] Lingard, v. 210.

of Pembroke, who held out hopes that Edward might still be effectually opposed, and it was decided to proceed at once to Exeter[1] through the western counties, where their friends were still considerable in numbers.

A more bitter disappointment to Sir John than that which he was fated to suffer on landing in England can hardly be imagined. When he left the French shores, the cause for which he had so long suffered and labored appeared to be secured. Henry had been for some months restored to his throne; his rival was a fugitive from England, and his rival's brother and Warwick, "the King-maker," were in arms for the Red Rose. But when he reached Weymouth all this was changed. Clarence, with his army, had deserted to the enemy, a great battle had been fought and lost, Warwick was killed, and Henry was again a prisoner.

His heart may well have sunk within him, and it is not surprising that his first impulse was to advise a return at once to France.[2] It was, however, otherwise determined. The final overthrow was still to come, and the venerable Chancellor was once more to mingle in a bloody fight. The story may be told in the graphic though quaint words of an old chronicle, preserved by Leland. After marching unopposed through Somerset and Gloucestershire, "Prince Edward and his host came to Tewkesbury, and pitched his field by Severn."

"In the year of our Lord 1471, and the eleventh year of King Edward, Edward King fought with Prince Edward, Henry the Sixth's son, at Tewkesbury, the 4th of May, and King Edward won the field. Edmund Duke of Somerset and Sir Hugh Courtenay fled from Prince Edward, and sore weakened his field, yea and utterly lost it. There was slain Prince Edward, crying on the Duke of Clarence, his brother-in-law, for help. There were slain also Courtenay Earl of Devonshire, the Lord John of Somerset, the Lord Wenlock, Sir Edmund Hampden, Sir Robert Whittingham, Sir William Vaux, Sir Nicholas Hervey,

[1] Leland, Collectanea ii. 505.

[2] Rapin.

Sir John Delvis, Sir William Fielding, Sir Thomas Fitzhenry, Sir John Lewknor.

"These were first pardoned by King Edward, against whom, entering a church with his sworn drawn in Tewkesbury, a priest brought the Sacrament against him, and would not let him enter until he had granted his pardon to them that follow:—the Duke of Somerset, the Lord of St. John's, Sir Humphrey Audley" (and twelve more); "all these when they might have escaped tarried in the church, trusting the King's pardon, from Saturday to Monday in the morning, when they were taken out and beheaded.

"After the field of Tewkesbury, Queen Margaret, Prince Edward's wife the second daughter of the Earl of Warwick, the Countess of Devonshire, dame Catarine Vaus, were taken; and these men of name were taken and not slain, Sir John Fortescue, Sir John Saint Lowe, Sir Henry Roos, Thomas Ormond, Doctor Mackerel, Edward Fulforde, John Parker, John Basset, John Walleys, John Throgmorton."[1]

We do not know why Fortescue was spared,—perhaps the conqueror Edward respected his age, or his appetite for blood may have been satisfied by the number of previous victims more actively engaged in the actual conflict, in which so many of Fortescue's fellow-exiles fell. His unhappy master, King Henry, was murdered at night in the Tower, on the 21st of May, the day before Edward's return to London from Tewkesbury in triumph, with Margaret a prisoner in his train, who remained a captive for five years, when she was ransomed by King Louis of France, and died in that country in 1482.

Sir John's imprisonment was not of long continuance. According to a tradition, still current on the spot, he was soon released, and ordered to remain at Ebrington. He was no longer formidable to Edward after the deaths of Henry and the Prince his son, nor after these events was there any one but the reigning sovereign to claim the allegiance of Englishmen, who had uni-

[1] Leland's Collectanea, by Hearne, vol. ii., p. 505.

versally submitted to the new dynasty. It is not therefore surprising either that Edward should be willing to pardon him, or that Fortescue should feel that he might without any impropriety or inconsistency become his "true liegeman." It was not long before he was received into favor, his pardon being granted under the Broad Seal of Edward the Fourth, dated at Westminster, the 13th of October, 1471. This document, which contains a declaration that it is by authority of Parliament, was extant not many years ago, Mr. Incledon, the compiler of "Stemmata Fortescuana," an MS. volume belonging to Lord Fortescue, written in 1795, there stating that he had seen it.

Fortescue was upon this forthwith reappointed a Privy Councillor, this fact being mentioned in his tract called "A Declaration on Writings from Scotland."[1] Edward had set him free, pardoned, and restored him to the Council, without any unusual conditions. But before he gave him back his lands and manors, he required the old lawyer to argue for his hereditary right to the crown, as he had before done against it, and in behalf of that of King Henry. Lord Campbell, in his "Lives of the Chief Justices," thus accounts for the imposition of these distasteful terms:

"One good deed Chief Justice Billing did which should be recorded of him, in advising Edward the Fourth to grant a pardon to an old Lancastrian, Sir John Fortescue. But for the purpose of reducing this illustrious judge to the reproach of inconsistency, which he knew made his own name a bye-word, he imposed a condition that Fortescue should publish a new treatise to refute that which he had before composed proving the right of the House of Lancaster to the throne."

In his "Latine Booke," which he was now to answer, the "De Naturâ Legis Naturæ," he had descanted upon the reasons why a woman should not reign as a supreme ruler, drawing largely, as was the custom of his time, upon Holy Scripture, to prove what they had in fact never touched upon or considered, and what the author of "De Laudibus" must have well known to be a question of expediency only, and not of abstract right or wrong.

He had got together passages from the Bible and the Fathers, to show that the man was ordained to be above the woman, and therefore no woman ought to reign over man; but in the "Declaration" he ingeniously discovers his error, and sees that such passages as that in Genesis, "Thou shalt be under the power of man, and he shall be thy lord," ought to be differently explained—"which words," he says, "spoken to that woman, was, as I thoo wrote, spoken to all kind of woman, as the words then spoken by God to the first man was said to all mankind. This matter ye now desire that I will so declare as the King our Sovereign Lord be not harmed in them in his titles of England or of France—so, as to the first point, I hope to find not difficult, for our Lord said not in his foresaid judgment that a woman should be under the power and lordship of all men, or of many men; but he said indifferently or indeterminably that she should be under the power and lordship of man, which is true if she be under the power and lordship of any man; and that every woman is under the power and lordship of some one man (which is all that she is cited unto by the foresaid judgment in Genesis) may not be denied, for every woman is under the power and lordship of the Pope, which is a man, and the Vicar of Christ, God and man. Wherefore the foresaid text of Genesis, or any thing by me deduced thereof, may not prove that a woman may not reign in a kingdom of which the king hath no sovereignty or temporality, sithen she abideth always subject to the Pope; and by the same reason it may not hurte the King in his titles to his foresaid two realms."

He thus shortly and easily disposes of, without actually contradicting, his own former long and labored treatise "on the other side," and accepts the claim of Edward as descended, though in the female line, from Lionel, Duke of Clarence, Edward the Third's second son, as better than that of the Plantagenet Kings, who descended in the male line from John of Ghent, his third son.

There remained to be got rid of a question of fact. Fortescue,

in his "Defense of the House of Lancaster," had asserted that Philippa, daughter to Lionel, Duke of Clarence,[1] through whom the claim of the House of York arose, had never been acknowledged by her father. He now explains that he made that statement in ignorance of certain records, which, on his return to England, had been for the first time showed him; "by which records it clearly appeareth that the foresaid Phillipe was daughter and heir to the foresaid Duke of Clarence, and to Elizabeth his Wife, because that she and the Earl of March, her husband, had livery in the Chancery of all the lands of the Duke."

It may well be doubted whether Fortescue really had any strong opinion on the question of the right of females to reign. He had argued well and ingeniously, according to the notions of his time, against that right, as a lawyer for his client, because he did all that he could to support Henry on the throne, he being, as he says, "No Judge, but a partial man to him, for whose favour he made the arguments,"—that is, one sincerely desiring to support Henry's rule; and afterwards, when he was writing as a still more "partial man," on the opposite side—that is to say, fulfilling the condition of his restoration to his estates—he escapes from his former arguments by a device which he must have laughed at in secret as childish and almost comical.

No one who has read his outspoken language in "De Laudibus," when he repeats again and again the maxim that Kings of England must not make the laws, but must govern according to them, and that the laws, to be binding on the people, must have the people's consent, can doubt that he was ready to accept heartily, so far as right went, either Henry or Edward, or any sovereign, when once the consent of the nation had been deliberately and decidedly expressed in his favor.

He says: "The King is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose he has the delegation of power from the people, and he has no just claim to any power but this."

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[1] Lingard, v. 217.

Again, "It is plain that if Kingly power did not originally proceed from the people, the King could have no such power rightfully at all."

Nor did Fortescue change his opinion or his language respecting the kind of kingly government which was the best for a people to live under. He writes as strongly upon it under Edward the Fourth as he had done in the time of his predecessor. For example, he says, in his latest work, that "the Dominium Politicium et Regale began by the Desire and Institution of the people of the Prince;" and adds, "Blessed be God, this Land is ruled under a better law, and therefore the people thereof be not in penury, nor thereby hurt in their persons, but they be wealthy, and have all things necessary to the sustenance of Nature. Lo, this is the fruit of Jus Politicum et Regale under which we live."[1]

However superficial may have been his answer to his old arguments, it was a complete retractation of them, and satisfied the King's advisers, so that he had now only to present his petition for the reversal of his attainder, which was as follows:[2]

To the King oure Soverayn Lord: In the moost humble wyse sheweth unto youre noble grace, your humble subget and true Liegeman John Fortescue Knyght, which is, and ever shal be duryng his lyf, youre true and feithful Subget and Leigeman, Soverayn Lord by the grace of God; howe be it the same John is not of power, ne havior to do youre Hignes so good service as his hert and wille wold do, forsomoche as in youre Parlement holden at Westminster the fourth day of November the first yere of your most noble reigne, it ordeyned, demed, and declared, by auctorite of the same Parlement, that the said John by the name of John Fortescue Knyght, amonge other persons shauld stond and be convicted, and attaynted of high treason, and forfeit to you Soverayn Lord and youre heires all the Castels, Maners, Lordshippes, Londes, Tenementes, Rentes, Services, Fees, Ad-

[1] De Dominio, pp. 14–24.

[2] Rolls of Parliament, vi., p. 69.

vousons, Hereditaments, and Possessions, with their appurtenances, which he had of astate of enheritaunce, or any other to his use had, the thirtieth day of December next afore the first yere of youre moost noble reign, or into which he, or eny other persone or persones, feoffeez to the use or behofe of the same John had the same thirtieth daie lawfull cause of entre within Englond, Irelond, Wales, or Caleis, or the Marches thereof; as more at large is conteyned within the same Acte or Actes.

Please it youre Highnes, forasmuch as youre said Suppliaunt is as repentaunt, and sorrowfull as eny creature may be of all that which he hath doon or committed to the displeasure of youre Highnes contrarie to his deutie, and liegeaunce, and is, and perseverantly shal be to you Soverayn Lord, true, feithful, and humble subget and Liegeman, in wille, word, and dede; if youre moost habundaunt grace by th' advis, and assent of the Lordes Spirituell and Temporell, and the Comens, in this youre present Parlement assembled, and by auctorite of the same to enacte, ordeyne, and stablish, that the seide Acte, and all Actes of atteyndre, or forfeiture made ayenst the same John and his feoffees to the use of the same John, in youre said Parlement holden at Westminster the said fourth day of Novembre, as ayenst theym, and every of theym, and eny of theym, by what name or names the same John be named, or called in the same Acte or Actes of, in, or by reason of the premisses, be utterly voide, and of noone effecte ne force; and that the same John nor his heires in no wise be prejudiced nor hurt by the same Acte or Actes made ayenst the same John, and that by the same auctorite youre said Suppliaunt and his heires have, posside, joy, and enherit all maner of Possessions, and heriditaments in like maner and fourme, and as ample and large wise, as the same John shuld have doon yf the same Acte or Actes never had be made ayenst the same John, and that the seid John and his heires, have, hold, joy, and enherit all Castelles, Maners, Lordships, Londes, Tenementez, Rents, Services, Fees, Advousons, and all other Hereditamentez and Possessions, with their appurtenauncez which come, or ought

to have comyn to youre hands by reason of the same Acte or Actes made ayenst the same John, and foeffez to his use, and into theym, and every of theym, to entre, and theym to have, joy, and posside in like maner, fourme, and condition, as the same John shuld have had or doon, yf the same Acte or Actes never had been made ayenst the seid John and his said feoffez to his use, without suying them, or eny of theym out of youre handes by petition lyvere, or otherwise by the course of your lawes.

And that all Lettres patentes made by your Highnes to the seid John, or to eny persone or persones of eny of the premisses be voide, and of noon effecte; Saving to every persone such title right and lawful entre as they or any of theym, had at the tyme of the said Acte or Actes made ayenst the same John or any tyme sith, other than by meane and virtue of youre Lettres patentes made sith the fourth day of March the first yeare of youre reigne, or eny tyme sith. And that noo persone or persones be empeched nor hurt of, or for, takyng any issues or profittes, nor for eny offenses doon in, or of eny of the premissez, afore the third day of the moneth of Aprill the thirteenth yere of youre reigne, and sith the said fourth day of March by the seid John or eny feoffez to his use by way of action or otherwise.

Provided alway that noo persone nor persones atteynted, nor their heires, take, have, or enjoy, any avauntage by this present Acte, but oonly the said John and his heires in the premisses, and also the feoffez to the use of the seid John oonly, for of and in the premisses which the same feoffez had to the use of the seid John the seid thirtieth day or any tyme sith: And youre said Suppliant shull pray to God for the preservation of youre moost Roiall Astate.

Consideryng Soverayn Lord, that youre seid Suppliant lovith so, and tenderith the good of youre moost noble Astate, that he late by large and clere writyng delyvered unto youre Highnes, hath so declared all the maters which were writen in Scotland and elleswhere, ayen youre right or title, which writynges have in enywise comen unto his knowlege, or that he at eny tyme hath

be pryve unto theym; and also hath so clerely disproved all the arguments that have be made ayen the same right and title that nowe there remayneth no colour, or matere of argument to the hurt or infamye of the same right or title, by reason of any such writyng, but the same right and title stonden nowe the more clere and open by that any such writyngs have be made ayen hem.

On the 6th of October, in the year 1473, this petition was laid before Parliament by the King's command, and the final stage in the reversal of the attainder was completed upon the signing of the Exemplification or Inspeximus on the 14th day of February, 1475.

After Sir John's restoration to his estates, he does not appear to have taken any part in public affairs.

The latest notice of him which I have seen is in the Records of the Exchequer, in the fifteenth year of this reign—namely, in February, 1476—when he delivered into the Exchequer an assize that had been taken before him when Chief Justice.[1]

His treatise "On the Difference between Absolute and Limited Monarchy" was written during this period.

He lived quietly for some years at Ebrington, a manor-house, part of which still remains included in the present less ancient building, close to the church and pretty village of the same name, looking over a smiling country of gentle hills and slopes, on the borders of Gloucestershire and Worcestershire, within the former county.

"Here," says Lord Campbell, "he quietly spent the remainder of his days, and here he died, leaving a great and venerable name to his posterity and his country. According to the local tradition, which the present occupant of the manor-house repeated to me, he lived to be ninety years old.

He was buried in the parish church, near the communion table, on the north side, where his tomb still remains. The church is

[1] Kal. Excheq. iii. 8. Quoted in Foss, Lives of the Judges, vol. iv., article "Fortescue."

not in itself remarkable, nor, except where a good Norman arch remains, near the tower, inside, can it be as old as the Chancellor's time. His monument is against the north wall, inside the communion rails. It consists, first, of a large mural tablet, put up in 1677 by Colonel Robert Fortescue, the then owner of the family property, surmounted by the Fortescue arms, bearing the following inscription :

In
Fælicem et immortalem memoriam
Clarissimi Viri Domini
JOHANNIS FORTESCUTI
Militis, Grandævi, Angliæ Judicis Primarii,
Et processu temporis sub Henr. VI. Rege et
Edwardo Principe summi Cancellarii,
Regis Consiliarii prudentissimi,
Legum Angliæ peritissimi
Nec non earundem
Hyperaspistis
Fortissimi
Qui
Corporis Exuvias Lætam Resur-
rectionem expectantes
Hic deposuit.

Marmoreum huc monumentum
Positam est A. D.
MDCLXXVII.
Voto et Expensis Roberti Fortescuti
Armigeri, ejusdem Familiæ Hæ-
redis nuper defuncti.

Anglegenas intra Cancellos Juris et Æqui
Qui tenuit, Cineres jam tenet Urna Viri.
Lex viva ille fuit Patriæ, Lux splendida Legis,
Forte bonis scutum, sontibus et scutica.
Clarus erat titulis, clarus majoribus, arte
Clarus, virtute ast clarior emicuit.
Jam micat in tenebris, veluti Carbunculus Orbi,
Nam Virtus radios non dare tanta nequit.
Vivit adhuc Fortescutus laudatus in Ævum;
Vivit et in Legum laudibus ille fuis.

This is rendered into English, in the "Biographia Britannica," thus:

To
The happy and immortal memory
Of that most famous man
SIR JOHN FORTESCUE,
An ancient Knight, Chief Justice of England,
And in process of time, under Henry VI.
And Prince Edward, High Chancellor.
Of the King, the most prudent councellor,
In the laws of England profoundly learned
And of these laws also
A Champion
Invincible;
Whose earthly remains, in expectation of
A joyful Resurrection
Are here deposited.

This marble monument
Is erected
MDCLXXVII
By the direction and at the expence of
Robert Fortescue, Esq.
The direct heir of this family, lately deceased.

Of him, who justice could the best explain,
This little urn does all that's left contain.
His country's living law, that law's great light,
The scourge of wrong, and the defence of right;
His birth distinguished, merit gave him state,
Learning, applause, but virtue made him great.
Through darkness now a carbuncle he shines
Nor wisdom's rays the gloomy cave confines;
To latest times shall Fortescue be known,
And in the law's just praise be read his own.

The tomb itself is surmounted by a full length figure of the Chancellor, in red robes and cap, very brilliant in their new paint, lying on his back, with the hands joined as in prayer. On the three sides of the tomb the family arms are repeated several

times on shields, also colored newly. The tomb and figure are supposed to have been erected soon after the Chancellor's death.

Sir John's only son, Martin, had died in 1472, on the 12th of November, leaving, as we find by a post-mortem inquisition held at Torrington on the 12th of May, 12th of Edward IV., his son and heir, John Fortescue, aged twelve years, and a second son, William. Through this elder son the estate of Ebrington has come down in direct male succession to the present Earl Fortescue. Lord Fortescue's estates of Wear Giffard and Filleigh, or Castlehill, have in like manner been inherited through the Chancellor's grandson, in right of his mother, the heiress of Denzile. His younger grandson, William, succeeded to the Buckland-Filleigh property, and it continued in his male descendants until the year 1776, when, upon the death of John Fortescue, who had inherited it from the Right Honorable William Fortescue, the estate passed in the female line to Mr. Richard Inglett, and was sold by his son, Colonel John Inglett Fortescue, who died in the year 1840.

The present Earl Fortescue informs me that neither he nor any member of his family holds any lands which at any time were the Chancellor's, excepting Ebrington. Philips Norton, in Somersetshire, which came to him by his wife, Isabella Jamys, remained with his descendants until sold by Hugh Fortescue, Earl Clinton, about 1725, to a Mr. Edward Trip.

The male descendants of the Chancellor of the Buckland-Filleigh house, although extinct in the elder line, have been continued through Sir Faithful Fortescue of Buckland-Filleigh, who went to Ireland in the reign of James the First with his uncle, Arthur Lord Chichester, the Lord Deputy, and who is the ancestor of the Earl of Clermont and of the present Lord Clermont, who writes this memoir.

Of Sir John's character, there appears to have been, from his own times to the present, but one opinion. His judgments are still referred to with veneration, and the only two of his works which have been hitherto published are quoted by nearly all who

have written on the early English constitution as authorities of the greatest weight, both as to facts and doctrines.

A writer, born about twenty years after Fortescue's death—Bishop Bale, in his "Scriptorum Illustrium Majoris Britanniæ Summarium," is among the earliest who have left on record an opinion of his merits:

"Foskevue alias Forteskevue ut Recordus[1] habet, juris peritissimus, primarius judex, et Angliæ Regni Cancellarius summus, inter eruditos in nostro catalogo locum et doctis laboribus honorificum petit. Quem si illi negaremus ingrati merito appellaremur.

"Excoluit tum juvenis, tum etiam senex, virtutem, literasque politas ut qui maxime semper amavit.

"Inter forenses Londini clarissimus juris civilis interpres admittebatur; ac nobiliores in schola juvenes, peculiares a regibus conditas leges perdocuit. Inde a gradu ad gradum ascendit donec esset supremus Angliæ Cancellarius, quod munus in reipublicæ administratione et auctoritate, et dignitate, in eo regno longe maximum est.

"In quo officio tam candide se gessit ut justiciæ ac prudentiæ laus illi tribueretur summa. Quidquid dignitate valebat, aut gratia apud Princepem, id juvandæ reipublicæ totum impendisse fertur.

"In hoc zelo pietatis scripsit sub Henrico Sexto, Differentiam inter leges provinciales ac civiles, vel,

'De Discrimine Legum,' Lib. 1. 'Seviente dudum in regno Angliæ.'

'De Laudibus Legum,' Lib. 1.

'De Politica Administratione,' Lib. 1.

'De Vigore Legis Naturalis,' Lib. 1, aliaque nonulla.

"Tandem fuit exul ab Anglia. Et colligo illum claruisse circum tempus civilis belli quo Edwardiani cum Henricianis

[1] Recordus, *i. e.* Robert Record, a writer who died in the last year of Queen Mary, 1558. See Biog. Britt., article "Fortescue."

Anno Domini 1460, de imperii summa pertinacissime certabant. Exilii vero causas non legi."

Sir Edward Coke, the celebrated Chief Justice of the reigns of Elizabeth and James, mentions his "profound knowledge of the law, and his excellence as an antiquary,"—that is to say, as an historian—styling him "that most reverend and honorable Judge," and, when commending trial by jury, he says: "For the excellency of this kind of trial, and why it is only appropriated to the common laws of England, read Justice Fortescue, chapters 25, 26, 28, 29, 30, 31, 32, &c., &c., of his book 'De Laudibus Legum Angliæ,' which being worthy to be written in letters of gold for the weight and worthiness thereof, I will not abridge any part of the same, but refer the learned reader to the fountain itself;" and in another place he relates with approbation a case in the 34th of Henry VI., when the Judges, with Fortescue at their head, and speaking for them, gave an opinion against the power of the King to make the Sheriff of Lincolnshire a person who had not been "chosen and presented unto his Hignes, after the effect of the Statute in such behalf made."

Here is the opinion of Coke upon Sir John's conduct in retracting his Defense of Henry VI.:

"FORTISCUE De Laudibus Legum Angliæ; this book was written in the reign of King Henry VI., in commendation of the Laws of England, containing withal much excellent matter worthy of the reading. He wrote also a book in defense of the title of King Henry VI., his sovereign Lord and Master, to the crown of England; but after out of truth and conscience, retracted the same, both which I have. Wherein he derived singular commendation, in that he was not amongst the number of those 'qui suos amassent errores,' but yielded to truth when he found it. This Sir John Fortescue was Lord Chief Justice of England, and afterwards Lord Chancellor of England, and his posterity remain in great and good account to this day."

An anonymous admirer has written, in a hand bearing marks of being almost as old as the volume which contains them, the following lines:

> "Legis en nostræ tibi forte-scutum
> Sive rem spectes, seriemve scripti
> Sive scriptoris placeat notare
> Nobile Nomen."

These are on the fly-leaf of a copy of an edition of "De Laudibus," published in the year 1599, now in my possession.

In the same sense, Sir Walter Raleigh styles him "that notable bulwark of our laws."

To come down to our own time, I find the character of Sir John as a Judge, a Statesman, and a Writer, so fully and favorably drawn by the late Lord Campbell, he himself, like Fortescue, an authority of high literary, as well as legal reputation, that I shall, without apology, insert here, in conclusion, an extract from the interesting memoir:[1]

"It is delightful, amidst intriguing Churchmen and warlike Barons who held the Great Seal in this age, to present to the reader a lawyer not only of deep professional learning, but cultivated by the study of classical antiquity; and not only of brilliant talents, but the ardent and enlightened lover of liberty, to whose explanations and praises of our free constitution we are in no small degree indebted for the resistance to oppressive rule, which has distinguished the people of England.

"As a common-law Judge, Fortescue is highly extolled by Lord Coke, and he seems to have been one of the most learned and upright men who ever sat in the Court of King's Bench.

"He laid the foundation of parliamentary privilege to which our liberties are mainly to be ascribed. He had the sagacity to see that if questions concerning the privileges of Parliament were

[1] Campbell, Lives of Chancellors, vol. i., pp. 371, 376 et seq.

to be determined by the Common-law Judges appointed and removable by the Crown, these privileges must soon be extinguished, and pure despotism must be established. He perceived that the Houses of Parliament alone were competent to decide upon their own privileges, and that this power must be conceded to them, even in analogy to the practice of the Court of Chancery and other inferior tribunals. Accordingly, in Thorpe's case, he expressed an opinion which, from the end of the reign of King Henry the Sixth till the commencement of the reign of Queen Victoria, was received with profound deference and veneration.

"Thorpe, a Baron of the Exchequer, and Speaker of the House of Commons, being a Lancastrian, had seized some harness and military accoutrements, which belonged to the Duke of York, who brought an action of trespass against him in the Court of Exchequer to recover their value. The plaintiff had a verdict, with large damages, for which the defendant, during a recess of Parliament, was arrested and imprisoned in the Fleet. When Parliament reassembled, the Commons was without a Speaker, and the question arose whether Thorpe, as a Member of the Lower House and Speaker, was not now entitled to be discharged?

"The Commons had a conference on the subject with the Lords, who called in the Judges, and asked their opinion.

"The said Lords, spiritual and temporal, not intending to impeach or hurt the liberties and privileges of them that were coming for the commerce of this land to this present Parliament, but legally after the course of law to administer justice, and have knowledge what the law will weigh in that behalf, opened and declared to the Justices the premises, and asked of them whether the said Thomas Thorpe ought to be delivered from prison by, for, and in virtue of the privilege of Parliament or no? 'To the whole question,' says the report, 'the Chief Justice Fortescue, in the name of all the Justices, after sad communication and delib-

eration had amongst them, answered and said: that they ought not to answer that question; for it hath not been used aforetime that the Justices should in any wise determine the privilege of this high court of parliament; for it is so high and so mighty in its nature, that it may make law; and that that is law it may make no law; and the determination and knowledge of that privilege belongeth to the Lords of the parliament, and not to the Justices.'[1]

"In consequence of this decision, the two Houses of Parliament were for many ages allowed to be the exclusive judges of their own privileges; liberty of speech and freedom of inquiry were vindicated by them; the prerogatives of the Crown were restrained and defined; and England was saved from sharing the fate of the monarchies on the Continent of Europe, in which popular assemblies were crushed by the unresisted encroachment of the executive government.

"What acquaintance Fortescue had with equity we have no means of knowing; but it is clear that he was not a mere technical lawyer, and that he was familiar with the general principles of jurisprudence.

"As a writer, his style is not inelegant, though not free from the barbarism of the schools; and he displays sentiments on liberty and good government which are very remarkable, considering the fierce and lawless period when he flourished.

"His principal treatise has been celebrated not only by lawyers, but by such writers as Sir Walter Raleigh, and not only by Englishmen, but by foreign nations.

"Notwithstanding his tardy submission to the House of York, he is to be praised for his consistency as a politician. Unlike the Earl of Warwick and others, who were constantly changing sides according to interest or caprice, he steadily adhered to the House of Lancaster until it had no true representative, and the

[1] Thorpe's case, 31 Hen. VI. 1452; 13 Rep. 63; 1 Hatfell, 29; Lord Campbell's Speeches, 225.

national will had been strongly expressed in favour of the legitimate heir. We must indeed regret the tyranny of Edward, who would not generously pardon him on account of his fidelity to his former master; but his compliance with the arbitrary condition imposed upon him should be treated with levity by those who have never been exposed to such perils."

A LIST OF ALL THE KNOWN WORKS OF SIR JOHN FORTESCUE.

1. OPUSCULUM DE NATURA LEGIS NATURÆ.

A Latin treatise, in two parts; sometimes called "De Vigore Legis Naturalis." A copy of Part I. is in the Bodleian, among the Laud MSS., and there was also a copy in the Worsley Library. The only known copy of Part II. is in the Lambeth Library, which contains an MS. of the whole treatise complete. This second part was not known in 1732 to Mr. Gregor, who says, in his Preface to "De Laudibus," that it was supposed to be lost, or probably destroyed by its author—a remark repeated in the "Biographia Britannica" in 1750. Mr. Casley, in his list of Fortescue's works, in 1745, makes no mention of a second part. Neither part has been printed before Lord Clermont's edition.

2. DE LAUDIBUS LEGUM ANGLIÆ.

A Latin Treatise, first printed in the reign of Henry VIII.

3. DE DOMINIO REGALI ET POLITICO.

Written in English. Edited and printed by Lord Fortescue of Credan, in 1714 and 1719.

4. A DIALOGUE BETWEEN UNDERSTANDING AND FAITH.

The only known copy is on six leaves folio, in the Cotton Collection in the British Museum. It was much injured by fire in 1731. First printed in Lord Clermont's edition.

5. OF THE TITLE OF THE HOUSE OF YORK.

A treatise written in support of the claim of the House of Lancaster, of which the fragments printed in Lord Clermont's edition for the first time are all that are known to exist. The Cotton copy of the MS. was destroyed in the great fire, and there is no other copy known.

6. A DEFENSE OF THE HOUSE OF LANCASTER.

The only copy known perished in the fire at the Cotton Library. It was written upon one leaf. The only remaining passage is that printed in Lord Clermont's edition, for the first time.

7. DEFENSIO JURIS DOMUS LANCASTRIÆ.

Written in Latin. The only known copy perished in the fire at the Cotton Library. The passages from this work, which, with one exception, are printed in Lord Clermont's edition for the first time, are all that have survived.

8. A GENEALOGY OF THE HOUSE OF LANCASTER.

The Cotton copy lost, and no other known.

9. GENEALOGIA REGUM SCOTIÆ AB ADAMO USQUE AD JACOBUM SECUNDUM.

The Cotton copy lost. No copy known to exist.

10. THE DECLARACION BY JOHN FORTESCU, KNYGHT, UPON CERTAYN WRYTINGS SENT OUTE OF SCOTLANDE AYENST THE KINGE'S TITLE OF THE ROIALME OF ENGLAND.

Several copies exist in MS. Printed in Lord Clermont's edition for the first time.

A work given in Casley's list of Fortescue's works, as "A Defence of the House of York and King Edward IV.," appears to be merely the above "Declaracion" under a different name; for, although the list was made so late as in 1745, no trace of any such treatise can be found, and yet if it was then in existence, it could hardly be now forgotten.

11. A LIST OF THE COMODYTES OF ENGLOND.

The only copy of this work known is among the Laud MSS. in the Bodleian, from which it was printed in Lord Clermont's edition for the first time. Its authorship has been doubted by some writers.

12. LEGAL ADVICE TO PURCHASERS.

In verse, on a single page, headed *Breve quoddam utile secundum Fortescu.* Printed in Lord Clermont's edition for the first time, from an MS. in the Rawlinson Collection in the Bodleian.

Risdon, writing about 1600, says that "Sir John Fortescue wrote a Prayer Book which savoured much of the times we live in." See Risdon's "Survey of Devon," p. 189. This is the only notice of its existence.

The only complete edition of the works of Sir John Fortescue is that privately printed in 1869 by Lord Clermont, in two superbly printed and illustrated quarto volumes, under the general title of "Sir John Fortescue, Knight: His Life, Works, and Family History." The life and works occupy the first volume, which bears the title "The Works of Sir John Fortescue, Knight, Chief Justice of England and Lord Chancellor to King Henry the Sixth, now first collected and arranged by Thomas (Fortescue) Lord Clermont. London. Printed for private distribution. 1869. Pp. xxvii. 556, 38* (335*–372*), 119. With two portraits, nine other plates, fac-similes, etc., and one wood-cut. Contents: Life of Sir John Fortescue, by Lord Clermont, pp. 1–55; De Natura Legis Naturæ, Latin text, pp. 63–184; Translation by Right Hon. Chichester Fortescue, M. P., pp. 187–333; Remarks upon the Preceding Treatise, with Table of Quotations and Notes, by the Translator, pp. 335*–372*; De Laudibus Legum Angliæ, Latin text, 335–383; Translation, by Francis Gregor, Esq., pp. 385–442; De Dominio Regali et Politico: A Treatise on Absolute and Limited Monarchy, and in par-

ticular on the Monarchy of England, pp. 445-474; Example what good Counsayle helpithe and advantagethe, pp. 475-476; The Twenty-two Rightwitnesses belongynge to a Kynge, pp. 477-478; A Dialogue between Understanding and Faith, pp. 479-490; Extracts and Fragments from the missing Tracts on the Claim of the House of Lancaster to the Crown of England, pp. 491-502; Defensio Juris Domus Lancastriæ, and translation, pp. 505-516; A Defence of the Title of the House of Lancaster, pp. 517-518; A Declaration upon certayn Wrytinges sent out of Scotteland ayenst the Kingis Title to hys Roialme of England, pp. 519-541; Legal Advice to Purchasers of Land, pp. 543-544; The Comodytes of England, pp. 545-554; A List of all the Known Works of Sir John Fortescue, pp. 555-556; Legal Opinions and Judgments of Sir John Fortescue as Lord Chief Justice of England, with translation, pp. 1-119.

The title-page of Vol. II. is as follows: "A History of The Family of Fortescue, in all its Branches, by Thomas (Fortescue) Lord Clermont. London. Printed for Private Distribution. 1869. pp. xii. 378. With fourteen sheets of pedigrees, and eleven plates, portraits, etc."

The copy presented to the Public Library of Cincinnati by Lord Clermont, contains, in addition, fine steel-plate portraits of the author and of his brother, the Right Honorable Chichester Fortescue, M. P. (created Lord Carlingford in March, 1874.)

LORD CLERMONT'S PREFACE.

This very famous Tract was the second of the two Essays produced by Sir John Fortescue for the benefit of Edward, Prince of Wales, eldest son of King Henry the Sixth, during his exile in Barrois.

This circumstance limits the date of its composition, or, at all events, of its appearance in its present form, to the period between 1464 and 1470; while its allusions to the earlier part of that period, as to time long gone by, make it almost certain that Fortescue completed it towards the end of his sojourn in France.

It was first printed in the reign of Henry VIII. by Edward Whitechurche, who began to print in the year 1537, without date, in black letter, and in 16mo form, with the following title and address to the reader:

"Prenobilis Militis cognomento FORTESCU, qui temporibus Henrici Sexti floruit, de politica administratione, et legibus civilibus florentissimi Regni Anglie, commentarius.

"Excusum Londini tipis Edwardi Whitechurche et veniunt in edibus Henrici Smyth, Bibliopole.

"Cum privilegio ad imprimendum folium."

"PIO LECTORI.

"Istius non minus pii quam eruditi opusculi exemplar nactus, quum antiquitatem venerandum una cum eruditione ac pietate conjunxerit: non potui, optime lector, aut patrie tam ingratus, aut antiquitatis tam inofficiosus cultor esse, ut te illius lectione diutius fraudarer. Continet enim in se (ut cetera taceam) politicarum et civilium nostre Anglie legum quibus preclara et florentissima hec respublica sub illustrissimo et nunquam satis laudato

principe nostra Henrico octavo, ejusque progenitoribus regibus Anglie hactenus felicissime fuerit erecta, instituta, et gubernata, doctissimum encomion. Unde easdem nostras leges non solum Romanorum Cæsarum, sed et omnium aliarum nationum constitutiones multis parasangis prudentia, justitia, et equitate precellere facile prespicias. Eme ergo, lege, et fruere, ac labores nostros boni consule. Vale."

The first English translation was made by Robert Mulcaster, who printed it with the Latin text in Elizabeth's reign, in 16mo, without date, and again in 1573.

Watts enumerates editions of the same translation in 1575, 1578, 1599, and 1609.

In 1616, the text, varying in a few places from the preceding editions, together with the translation by Mulcaster, was again published in 16mo., with preface and notes by John Selden, but without his name. He added "the two Summes of Sir Ralph de Hengham" in the same volume. This volume was reprinted in 1660, and all subsequent editions of the treatise give the text as adopted by the learned editor in 1616.

In 1672 an edition in 16mo came out, with Selden's name, and with Mulcaster's translation printed for the last time.

We now come to a much improved appearance of "De Laudibus." In 1737, Mr. Francis Grigor, of Trewarthennick, near Truro, in Cornwall, published it with good type and paper in small folio, with a new translation, preface, and notes, preserving also those by Selden. In 1741, he brought out, in the same shape, a second edition of the work down to the end of the index to the English translation, binding up with this edition copies of the Latin text, with the title dated 1737, being part of the first edition. Both these editions are without the editor's name.

In 1775 a new edition appeared in 8vo, with the name of "Francis Gregor, Esq.," on the title-page, being a literal reprint of the two former, without any new matter. These three editions include Hengham's two tracts.

Fifty years later, in 1825, Mr. Amos, a barrister of Lincoln's

Inn, republished at Cambridge, in 8vo, Gregor's translation and text, with notes of his own.

The Latin text now given, including the corrupt mediæval spelling, is that of the earliest MS. of "De Laudibus" known to exist. It is preserved in the University Library at Cambridge, and is held to have been written not later than the second half of the fifteenth century. The autograph signature of Sir Robert Cotton is on its first page, and certain omissions have been supplied in the handwriting of Bishop Tanner. This MS., which is neither very carefully nor correctly written, has been collated by me with Whitechurche's first edition, from which, except in certain words and one entire passage, all apparently left out by a hasty transcriber, it rarely differs. These omissions have been supplied from that source. The only other MS. which has come to light is in the British Museum, in the handwriting of Glover, who lived in the reign of Elizabeth.

AMOS' PREFACE.

A NEW edition of Fortescue's treatise "De Laudibus Legum Angliæ" appeared to the Editor an useful undertaking, not only because he considered that copies of the work had become scarce and expensive, but also on account of the intrinsic value of the matter it contained. In the present edition will be found the Translation published in the year 1775; together with the original composition in Latin subjoined. A few notes are added; in which an endeavour has been made to point out rather than to pursue those channels of investigation which seemed requisite for elucidating the text, or for illustrating it by shewing its relation to the History, Antiquities, and Jurisprudence of the Country.

In examining the merit of this small tract of Fortescue, and the claim which it possesses upon public attention, it will be remembered with what respect it has been cited by the most eminent personages, whose names adorn our judicial annals, Coke, Somers, Holt, Blackstone. In many of the most momentous questions which have been agitated in Parliament and in the Courts of Westminster Hall, a powerful appeal has been made to the authority of this treatise. Neither can the character or the situation of the Author fail of imparting an additional interest to it. He was a person who filled the office of Chief Justice of England with great reputation, during a considerable period of the reign of Hen. VI. When he was composing his work "De Laudibus Legum Angliæ," he occupied, like Clarendon, the station of Lord High Chancellor, by the appointment of a Sovereign who had been deprived of his throne: And both those illustrious legal characters were conspicuous for making the instruction of their countrymen the object of their meditations in exile. Fortescue conceived that he was pursuing a judicious course for securing the future happiness of the English Nation,

in forming the character of the Heir Apparent to the throne, and acquainting him with the duties of a Patriot King: a task which in later times, even Hampden did not look upon as derogatory to his talents or incompatible with his independence.

Philosophy has undergone almost a new birth since the period when Fortescue wrote; education has received much improvement; the stores of learning have been augmented; experience has instructed and enlightened the present generation by the example of the ages that are past: It will not therefore be thought surprising that the reflections which the wisest of our ancestors have transmitted to us should often appear to our understandings puerile or ridiculous, the result of contracted or predjudiced views. Nevertheless the opinions and feelings of antiquity must be made an object of research, if we wish to arrive at an intimate knowledge of laws, considered as a criterion of the wants and the sentiments of a people. Lord Bacon has remarked that historians afford us a very imperfect light in this enquiry, "Versatur infelicitas quedam inter historicos vel optimos, ut legibus et actis judicialibus non satis commorentur, aut si forte diligentiam quandam adhibuerent, tamen ab authenticis longe varient." Whereas the writings of Fortescue present an interesting picture, drawn from what was passing under his immediate view, of the political, moral, religious and physical situation of the Country connected with its jurisprudence. It is from these circumstances, more than from books of Statutes and Reports, that the origin of national laws is to be discovered, their spirit and meaning to be collected, their excellence to be appreciated, and the blind veneration which often attends them to be dissipated. A previous enquiry concerning the original sources of national law is surely necessary for unfolding the design and the principles of our earlier legal institutions, and must afford great facilities towards the comprehending those parts of the present fabric of our Jurisprudence, of which the construction is of an ancient date, or which have been fashioned after the ancient model. Considering that in the present treatise of Fortescue are laid before the reader the ma-

terials which may assist in composing a philosophical history of the law, whilst the sentiments of our ancestors are there recorded upon the deeply important subjects of religion, government, and the administration of Justice, we shall perhaps not think the value of the work to have been overrated by Sir William Jones, who ascribed to it the preciousness of gold.

The benefit resulting from the perusal of Fortescue's treatise will be deemed of paramount utility, if it has the effect of cherishing in the minds of reflecting men those principles of government and civil obedience, which it inculcates, and which are admirably calculated to unite a Sovereign and his people by the ties of mutual interest, and of reciprocal protection and dependence. If these principles were first promulgated by Fortescue during his banishment, and when he was in the service of a Lancastrian King, he asserted them again in his work upon Political Monarchy, after he was restored to his Country, and his allegiance was plighted to a Prince of the House of York: and it will be seen in the course of the ensuing pages, that the spirit of the ancient government of England, as pourtrayed in this treatise, derives ample confirmation both from domestic authorities, and from foreign testimony. It may not appear a useless or unimportant task to have labored for the preservation of this early record of those simple and intelligible truths, which ought to form the basis of every rational government; and the importance of which is manifested by the fatal consequences arising from the neglect of them that are legible in our national history.

The remarks of Fortescue upon the legal institutions which are the subject of his panegyric, may be productive of other beneficial effects, if they satisfy the reader, that much of the ancient part of our law requires a serious revisal and amendment. It is impossible to peruse the Chancellor's observations in the course of the present treatise, without perceiving the extraordinary change which time has occasioned in the circumstances, the manners and the opinions of the English People. This obvious reflection may tend to confirm an impression, that the intricacy and want of rationality, which are justly imputed to a consider-

able portion of the Law of England, arise from an adherence to antiquated forms and maxims, adapted to a state of society totally different from our own. The institutions of the past generation have been moulded to supply the wants of the succeeding one, until the Law of the Country has become disfigured by a variety of fictions and subterfuges, scarcely intelligible even to lawyers, and highly oppressive to the community, by their prolixity and liability to error. It may be advisable in the present day to retrace the interval of some centuries, and to survey the provisions of our municipal law, with the light afforded by an ancient encomiast. It may be expedient to sift and examine the reasons which our forefathers assigned in support of what they have established. The mind will thus be enabled, by a more close observation, to distinguish between those parts of our system of jurisprudence, whose estimation has survived the period during which they were useful and appropriate, and such as retain an essential connection with the tranquillity and freedom of the Country.

TEMPLE, *Feb.* 1, 1825.

DE LAUDIBUS LEGUM ANGLIÆ.

INTRODUCTION.

During that impious and unnatural Civil War between the Houses of York and Lancaster, which not long since raged in England, and by means whereof their Sovereign King, Henry VI., with his consort Queen Margaret, who was daughter of the King of Jerusalem and Sicily, and their only son, Edward, Prince of Wales, were obliged to quit the kingdom: and at last the King, being taken prisoner by his subjects, suffered a very long and terrible imprisonment. But the Queen, with her son, being thus banished, made her abode in the dutchy of Bar, which at that time belonged to her father, the King of Jerusalem.

The Prince, as he grew up to man's estate, applied himself wholly to martial exercises; and being often mounted on fiery and wild horses, which he did not fear to urge on with the spur, made it his diversion, sometimes with his lance, sometimes with his sword, or other weapons, to attack and assault the young gentlemen his attendants, according to the rules of military discipline: which a certain grave old knight, his father's Chancellor, at that time in banishment with him, perceiving, thus accosts the Prince.

DE LAUDIBUS LEGUM ANGLIÆ.

Chapter I.—*The Chancellor exhorts the Prince to the Study of the Laws.*

I am right glad, most serene Prince, at that worthy genius of yours, whilst I observe with how great an inclination you employ yourself in such manly and martial exercises; which become you, not so much as you are a soldier, as that one time or other, you will be our king. For it is the duty of a king to fight the battles of his people, and to judge them in righteousness. (1 Samuel viii. 20.) Wherefore, as you divert and employ yourself so much in feats of arms, so I could wish to see you zealously affected towards the study of the laws:[1] because, as wars are decided by the sword, so the determination of justice is affected by the laws: which the emperor Justinian wisely considering, in the very beginning of the introduction to his Institutes, says: "It is not only incumbent upon the Imperial majesty to be graced with arms, but also to be fenced about with the laws: that he may know how to govern aright, both in times of peace and of war."[2] As an inducement to set yourself in

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[1] There is a curious tract written by Sir Robert Cotton entitled, "An answer to such motives as were offered by certain military men to Prince Henry, inciting him to affect arms more than peace."

[2] Our early writers upon law had a singular whim for imitating this passage in the beginning of their treatises. See the com-

good earnest about the study of the laws, the greatest law-giver of his time, Moses, formerly chief of the congregation of the people of Israel, invites you more effectually than Justinian, when, by divine inspiration, he commands the kings of Israel to read the laws all the days of their life, saying thus: "It shall be when he sitteth upon the throne of his kingdom, that he shall write him a copy of this law in a book, out of that which is before the priests, the Levites; and it shall be with him, and he shall read therein all the days of his life, that he may learn to fear the Lord his God, to keep all the words of this law, and these statutes, to do them." (Deut. xvii. 18, 19.) Helynandus, upon the place, says: "A prince therefore ought not, neither is he permitted, under the pretence of his duty as a soldier, to be ignorant of the laws.—A little after he is commanded to take a copy of the law from the priests and Levites, that is, from catholic and learned men." Thus he. Deuteronomy is the book of laws whereby the kings of Israel were obliged to govern the people committed to their charge: Moses commands their kings to read this book, that they may learn to fear the Lord their God, and keep his statutes which are written in the law. Behold, to fear God is the effect of the law, which a man can not attain to, unless he first know the will of God as it is written in the law. For, the principal, the chief point of obedience, is to know the will of that Master whom we are to serve and obey: and yet Moses here, in this edict of his, mentions the effect of the Law first, viz., the fear of God, and then exhorts to the keeping the commands of God, which are the cause of that fear; for

mencement of Glanville, Bracton, Fleta: the ancient treatise on the Scotch law called "Regiam Majestatem," derives its name from this circumstance.

the effect is always prior to the cause in the intention of the person who exhorts. But what kind of fear is that which the laws propose to the keepers thereof? Sure, it can not be that fear, of which it is written (1 John iv. 18) that perfect love casteth out fear. Yet that fear, though it seems a servile fear, often stirs up kings to read the laws. But this is not the effect of the law: the fear which Moses here intends, and which the laws produce, is that described by the prophet, "The fear of the Lord is clean, enduring for ever." (Psalm xix. 9.) This fear is filial and quite excludes that servile dread and horror which *that* hath which is cast out by love. This proceeds from the laws, which teach to do the will of God, in the doing whereof we shall escape all punishment. "The glory of the Lord (say the Scriptures) is upon them that fear him, whom also he glorifieth:" in a word this fear is the same which Job speaks of, when, after he had turned his thoughts many ways in search after wisdom, he gives us this, as the result of his enquiry: "Behold the fear of the Lord, that is wisdom, and to depart from evil is understanding." (Job xxviii. 28.) To depart from evil, the *laws* teach and caution; *whereby* they also produce that fear of God, which is the true wisdom.[1]

[1] The first few chapters of this treatise are replete with exploded opinions of philosophy, antiquated definitions of law, and strained applications of Scripture. Our ancient lawyers suffered their opinions and doctrines to receive a false and improper tincture from the favorite studies of their age; which, in proportion as they were few in number, had a greater tendency to exercise an undue operation on the judgment. Learning, before it became generally diffused, imparted a mystical importance to its possessors, and a display of it would consequently be gratifying to them: neither was it to be expected, that one age could rescue from destruction, and collect together the stores of ancient wisdom sacred

Chap. II.—*The Prince's Answer.*

When the Prince heard this, looking very intently at the old knight, he replied, I know, good Chancellor, that the book of Deuteronomy is a part of the Holy Scriptures, that the laws and ceremonies contained therein are of divine institution and promulgated by Moses; upon which account

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and prophane, and that it should also reduce them to their proper level in the scale of human knowledge, and to their proper influence on the human understanding.—The clerical and judicial character were in early times commonly united (Spelman's Gloss. voc. Justiciarius; Dugdale's Origines, pp. 21, 22), and theological learning was a favorite pursuit of the most eminent legal characters of this country. Sir E. Coke's poetical advice to students respecting the study of the Scriptures is well known. Sir Thomas More gave lectures, when a young man, upon St. Augustine "De civitate Dei," in St. Lawrence church; Clarendon wrote reflections and contemplations upon the Psalms of David; and Burnet observes, in his Life of Hale, that a person who should read the compositions upon the subject of divinity, which that Judge wrote, would imagine that the study of theology had occupied most of his time and thoughts. Fortescue informs us, in a subsequent part of this treatise, how much the reading of the Scriptures was blended with that of Law, in the Inns of Court: it is not therefore surprising if instances are found in the early law books and reports, in which a zeal for theological learning has betrayed the cultivators of it into occasional deviations from sound judgment, and violations of correct taste. Examples of this nature occur in the treatise called the Mirror, in which the Saxons are called throughout the people of God, and a comparison is made between their history and that of the Jews; in the resemblance which is traced in Plowden between a fine in the common pleas and the patriarch Noah; in a multitude of illustrations from

the reading of them is matter for a pious and devout contemplation; but the Law, to the study and understanding whereof you now invite me, is merely human, derived from human authority, and respects this world: wherefore, though Moses obliged the kings of Israel to the reading of the Deuteronomical law, it does not thence reasonably follow,

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Scripture adopted by Sir E. Coke in his writings, especially in the third Institute, not the least singular of which are the reasons he assigns for the several parts of the judgment in high treason. (3 Inst. 229; Hobbes's works, 638; Plowden, 354; Popham, 43.) Not less remarkable is the strong tincture which the minds of our ancient lawyers imbibed from the Aristotelian philosophy: Sir John Dodderidge, who died a Justice of the King's Bench, A. D. 1628, in a treatise called "The English Lawyer," expounds the law of England according to the doctrines of the schoolmen, treating each subject with reference to its material, formal, efficient and final cause. A commission of sewers is viewed in the same fourfold light by Sir E. Coke in his reports, and he considers the creation of a corporation as taking place conformably to Aristotle's notions respecting the origin of bodies in nature. The great deference paid by lawyers to the authority of that philosopher is very apparent from Plowden's observations, at the conclusion of his report of the case of Eyston and Studd; and the impressions which the jurisprudence of the country has received from this circumstance are still very discernible. (Keighley's Case, 10 Rep.; Case of Sutton's Hospital, 10 Rep., and see Noy's Maxims under the heads Logic and Philosophy.) It is also observable, that the writings of the civilians had a material influence in forming the opinions of the legal profession in this country. The law of England in its infancy stood greatly in need of being improved and enriched from the ample treasures to be found in the code of a highly civilized and enlightened people. We learn from Selden, that till the time of Edward the Third the doctrines of the civil law produced a sensible effect upon the judicial opin-

that by the same rule he invites all other kings to do the like as to the laws of their respective dominions: the reason of the study of the one and of the other, is not strictly the same.

Chap. III.—*The Chancellor enforceth his Exhortation.*

Chancellor. I observe, most excellent Prince, from your reply, with what care and attention you weigh the nature of my advice, which encourages me very much, not only to explain more clearly, but to enter somewhat deeper into the matters I have begun and proposed to you; be pleased to know then, that not only the Deuteronomical, but also all human laws are sacred; the definition of a law being thus: "It is an holy sanction, commanding whatever is hon-

ions delivered in our courts of justice. (Selden Diss. ad Fletam.) The quantity of materials of which Bracton has availed himself from the stores of the imperial jurisprudence, has, in the opinion of some persons, diminished his credit for fidelity, as a writer upon English law. (Plowden's Comm. 357, and marginal references, ibid. See the question examined in Reeve's History of the Law, Henry III.) Our ancestors were quicksighted in discerning the inexpediency of the imperial constitutions, whenever they militated against the rights of a free people; yet in other respects the step was not an immediate one, from looking up to authorities which justly merited their reverence, and which were their only guides in the complicated science of jurisprudence, to the scrutiny of them by the light of an unprejudiced reason.

The reader will perhaps be of opinion, that the few first chapters of this work, although they contain but a small portion of legal or constitutional information, may nevertheless be read with profit, as exhibiting an interesting example of the cast of thought which characterizes the ancient lawyers of this country, and the nature of the studies which principally engaged their attention.

est, and forbidding the contrary."[1] And that must needs be holy, which is so in its definition. The law or right is also defined "to be that which is the art of what is good and equal;" or, the law considered as a science or profession, may aptly be defined in the same manner. Whence we, who are the ministerial officers, who sit and preside in the courts of Justice, are therefore not improperly called *Sacerdotes* (Priests),[2] the import of the Latin word *Sac-*

[1] The definition in the text is taken from the civil law, and is cited by Coke from Bracton. Blackstone has made it the subject of a copious commentary. It has been objected to by Hobbes, on the ground that it supposes a statute, enacted by the sovereign power of a nation, may be unjust: this objection savours of Hobbes's peculiar philosophical notions, but perhaps it may be urged against the definition, that a law would not cease to be one, on account of its violating the rules of moral justice. Blackstone's opinions in that part of his work, in which he treats of the nature of law in general, are animadverted on with great ability by Mr. Bentham in his "Fragment on Government." Hobbes's own definition of a law is the following: "The command of him or them, that have sovereign power, given to those that be his or their subjects, publickly and plainly declaring what every one of them may do, and what they must forbear to do." (Dialogue between a Lawyer and a Philosopher.) The same writer points out a distinction between the terms *jus* and *lex*, which Coke uses promiscuously, but of which the different import is explained by Grotius. (De jure Belli ac Pacis, lib. 1, ch. 1.) Other definitions of a law have acquired considerable celebrity, being those which are given by Demosthenes, Cicero, Montesquieu, and Hooker. The subject has suggested some very ingenious philological speculations. (Diversions of Purley, Vol. II., pp. 7 and 8, on the words *right*, *just*, *law*.)

[2] Gravina adduces this appellation, which the Roman lawyers gave themselves, among other instances, to shew that the impe-

erdos being one who gives or teaches holy things; and all laws which are solemnly enacted by men have their authority from God: seeing the Apostle says (Rom. xiii. 1) that all power is from God. Laws which are made by men (who for this very end and purpose receive their power from God) may also be affirmed to be made by God, as saith the author of a book, going under the name of *Auctor Causarum*, whatsoever the second cause doth, that doth the first cause, but in a more excellent manner. Wherefore king Jehoshaphat says to his judges (2 Chron. xix. 6), "Take heed what you do, for ye judge not for man, but for the Lord, who is with you in the judgment:" whereby you are instructed, that to study the laws, though of human institution, is in effect to study the laws of God; which therefore can not but afford a pious and devout entertainment. But neither was it out of devotion only (as you rightly judge) that Moses commanded the kings of Israel to read the book of Deuteronomy rather than any other part of the Pentateuch, since all of them abound in matter for a devout and holy contemplation; to meditate on which is the part of every good man: the true reason of this command is, that in the book of Deuteronomy, the laws, whereby the kings of Israel were obliged to govern their subjects, are more expressly, more explicitly particularized than in any other of the books of the Old Testament, as the circumstances of the command do plainly evince. Wherefore, my prince, the same cause does no less exhort you than the kings of Israel that you ought to be a studious enquirer into those

rial law bears many traces of being supplied from the tenets and notions of the ancient schools of philosophy. The Stoics called themselves the priests of virtue. (Gravina de Jurisconsultorum Philosophiâ.)

laws, whereby you may be hereafter qualified to govern your subjects. For, what is said to the kings of Israel must be figuratively intended to be spoken to every king who bears rule over a people, who know and worship the true God. Upon the whole, could any thing be more fitly or more usefully offered to your consideration, than this command enjoined to the kings of Israel, to read and study their law? Since, not only the example, but the typical authority thereof, instructs and obliges you to behave conformably to the laws of that kingdom, to the crown whereof, with the permission of Divine Providence, you are in due course of time apparently to inherit.

CHAP. IV.—*He proves that a Prince by the Laws may be made happy.*

THE Laws, my dear Prince, do not only, with the Prophet, saying, " Come, ye children, hearken unto me, I will teach you the fear of the Lord," (Ps. xxxiv. 11,) call on you to fear God, whereby you may become wise; but the same laws also invite you to be exercised in them, that you may attain to felicity and happiness (as far as they are attainable in this life). For all the philosophers, who have argued so differently about happiness have agreed in this, that happiness is the end of all human desires, for which reason they call it the *summum bonum*, the greatest or chief good: the Peripatetics placed it in virtue; the Stoics in what is honest; and the Epicureans in pleasure: but, inasmuch as the Stoics defined that to be honest which is done well and laudably, according to the rules of virtue; and the Epicureans asserted that nothing is or can be pleasant without virtue, all those sects, according to Leonardus Aretinus, in his Introduction to Moral Philosophy, have

concurred in this, that it is virtue alone which procures and effects happiness, wherefore Aristotle, (Lib. 7, Polit.) defining happiness, says, "That it is the perfect exercise of all the virtues." This being granted, I desire you to consider what will follow from these premisses. Human laws are no other than rules whereby the perfect notion of justice can be determined: but that justice, which those laws discover, is not of the commutative or distributive kind, or any one particular distinct virtue, but it is virtue absolute and perfect, and distinguished by the name of Legal Justice, which the same L. Aretinus affirms to be therefore perfect, because it utterly rejects and discountenances whatever is vicious, and *teaches an universal virtue*, for which it is deservedly called, *simply*, by the name of virtue in the general; concerning which thus Homer and Aristotle, it is the most excellent of all the virtues, and that nor morning nor evening star is so bright or lovely as this. This justice is the subject of the royal care,[1] without which a king can not act in his judicial capacity as he ought to do, and without which he can not justly engage in any war; but this being once attained and strictly adhered to, the whole regal office will, in all respects, be adequately and completely discharged; so that (to sum up what we have said) happiness consists in the perfect exercise of all the virtues; and since that justice which is taught and acquired by the law, is universal virtue, it follows that he who has attained this justice is made happy by the laws, consequently has attained the *summum bonum*, or beatitude, since that and happiness

[1] That justice is an indispensable qualification in a Sovereign, was impressively inculcated by Burnet, on a very suitable occasion, in his sermon at the coronation of William and Mary, from the text 2 Sam., ch. xxiii., ver. 3 and 4.

in this fleeting life mean the same thing. Not that the law itself can do this exclusive of divine grace: nor will you be able to learn either what is law or virtue without it, not so much as in the inclination to it. For, as Parisiensis says, "The internal appetitive virtue of man is so vitiated by original sin, that vicious practices relish pleasantly, and the works of virtue seem harsh and difficult." Wherefore, that some give themselves up to admire and follow virtue, is owing to the grace of God, and not their own natural strength or uprightness of disposition. May I not now ask the question, Whether the laws, which through the divine concurrence work such good effects, as I have laid before you, are not to be studied with the utmost application? since he, who hath a just notion of them, is in the way to arrive at that felicity, which, according to the philosophers, is the end and completion of all human desires and the *chief good* of this life. Though what I have hitherto offered is of general consideration only, and therefore may not seem to concern you, as you are heir apparent to a Crown; yet, the words of the Prophet lay an obligation on you, even in that capacity, to apply yourself to the study of the law, when he says, "Be instructed, ye judges of the earth." (Ps. ii. 10.) The Prophet does not here persuade to the learning of any mechanical art or trade, nor yet of any science in theory, how proper or beneficial soever to mankind; for he does not say in general, Be instructed, ye inhabitants of the earth, but addresses himself in a particular manner to the kings, or rulers of this world; and exhort them to the study of the law, according to which they ought to administer justice and judgment to their people: "Be instructed, ye judges of the earth."—It follows, "lest at any time the Lord be angry, and ye perish from the right way." Neither, great Sir! do the Scriptures only oblige you to be

instructed in the laws, by which justice is to be learned and attained, but in another place gives it you in charge to love justice herself, saying, "Love righteousness, ye that be judges of the earth." (Wisd. Solomon i. 1.)

Chap. V.—*Ignorance of the Laws causes a Contempt thereof.*

But, Sir! how will you love righteousness, or justice, unless you first acquire a competent knowledge of the laws by which justice is to be learned and known; for, as the philosopher says, "Nothing is admired or loved unless it be known," which made the orator Fabius say, "That it would be well with the arts and sciences, if artists only were to make a judgment of them." What is not known is so far from being loved that it is usually despised, as saith a certain poet—

> The Rustic what he knows not always slights.

Nor is this the way of the clown only, but of men of learning and skill in the liberal arts and sciences. Suppose (for instance) a natural philosopher, who had never studied either the Mathematics, or Metaphysics, should be told by a Metaphysician that his science considers things abstracted from all matter and motion, both as to their *essence or reality*, and as to our conception of them: the Mathematician asserts, that his science considers things in reality conjoined to matter and motion, but separated from them in our conception: it is certain that our Naturalist, who was never acquainted with any thing separated from matter and motion, either in reality or conception, would not forbear laughing at both of them, and would be apt to despise their respective sciences, though of a sublimer na-

ture than his own; and that for no other reason but because he is perfectly unacquainted with them. So (my Prince) would you in like manner be surprised at a lawyer who should assert that one brother shall not succeed in the father's inheritance to another brother, who is not born of the same mother, but that the inheritance shall rather descend to the sister of the whole blood, or it shall come to the lord of the fee by way of *escheat:*[1] you would be surprised, I say, at this, as not knowing the reason of the law in this particular case. Whereas the seeming difficulty of this case gives no perplexity at all to such as are skilled in the common law of England: which confirms the vulgar saying, "The arts and sciences have no enemy but the unlearned."

But far be it, my Prince, that you should prove averse, or an enemy to the laws of that country to which you will in time inherit by right of succession, when the above cited text of Scripture instructs you to love righteousness. Wherefore, most noble Prince, permit me again and again to importune and beseech you to inform yourself thoroughly in the laws of your father's kingdom, not only that you may avoid the inconveniencies I have mentioned, but because the mind of man, which has a natural propensity to what is good, and can desire nothing but as it has the appearance of good, as soon as by instruction it comes to a per-

[1] The rule of descent mentioned in the text, "frater fratri uterino non succedet in hæreditate paternâ," is remarkable for being more liberal, than the rule for excluding the half blood, in the present day; and the passage in the text is noticed upon that account by Blackstone in his commentaries: he says, that it agrees with what is found in the costumier of Normandy.

fect knowledge of that good, it rejoices, takes pleasure therein, and as it improves by reflections, the pleasure grows more and more; from whence you may infer, that when you come to be instructed in those laws, to which you are at present a stranger, you will most certainly affect and love them, because they are excellent in their nature and reason; and the more you know of them, the more will you be entertained and pleased. For what is once loved does by use transform the person into its very nature, according to the philosopher, "Use becomes a second nature." So the cion of a pear-tree grafted on an apple-stock, after it has taken, draws the apple so much into its nature, that both become a pear-tree, and are called so from the fruit which they produce. So, virtue put in practice grows into a habit, and imparts its very name to those who practice it: as we say of one who is indued with *modesty*, *continence* or *wisdom*, that he is *modest*, *continent*, *wise*. So you (my Prince) when you shall have practiced justice with delight and pleasure, and have, as it were, transcribed the law, with the rule of justice, into your very habit and disposition, will deservedly obtain the character of a just prince.[1] And, as such, be saluted with those agreeable words of the Psalmist, "Thou lovest righteousness, and hatest wickedness, therefore God, thy God, shall anoint thee with the oil of gladness above thy fellows." (Ps. xlv. 7.)

[1] Sir E. Coke, whose mind was deeply impregnated with the learning of the schools, says that the King's justices were anciently called Justiciæ, for that they ought not only to be *justi* in the concrete, but *ipsa justitia* in the abstract. (2 Inst. 26.)

CHAP. VI.—*A Repetition of his Exhortation.*

AND now, most gracious Prince, are not these arguments, which I have offered, abundantly sufficient to induce you to the study of the law? Since thereby you will acquire a habit of justice, be honoured with the name and character of a just prince; not to say, that you will thereby also avoid the imputation and disgrace which attends ignorance; and moreover you will thereby attain to (that, which all men covet after) *happiness*, as far as it is attainable in this life; and through that fear of God which is the truest wisdom, and that charity or love of God which, in the peace and satisfaction of it passes all understanding, being, as it were, united to the best and greatest Being, the fountain of all happiness and perfection, you will become (to use the Apostle's expression) one spirit with him.

But, because these things (as I said) can not be wrought in you merely by the law, without the special assistance of divine grace, it is necessary that you implore for that above all things; as also that you search diligently into the knowledge of the divine law, as contained in the Holy Scriptures. For Holy Writ saith "Vain are all men by nature who are ignorant of God." (Wisd. Solomon xiii. 1.) I advise you, therefore, my Prince, that whilst you are young, and your soul is, as it were, a virgin-table, a blank space, you write it full with such things as I have above hinted at, lest afterwards it be more pleasantly, though delusively filled with characters of little or no importance, according to the saying of a certain author:

The vessel its first tincture long retains.

What mechanic is there so inattentive to the advantage of

his child, as not to instruct him in his trade while he is young, whereby he may afterwards gain a comfortable subsistence. So the carpenter teaches his son to handle the axe; the smith brings up his at the anvil; a person designed for the sacred office of the ministry is bred in a liberal way, at school: *so it becomes a king* to have his son (who is to succeed him) *instructed in the* laws of his country whilst he is yet young.[1] Which rule, if kings would but observe, the world would be governed with a greater equality of justice than now it is. And, if you please to follow the advice I give, you will show an example of no small consequence to other princes, persons of the same high rank and distinction with yourself.

Chap. VII.—*The Prince yields his Assent, but proposes Doubts.*

The Chancellor having ended, the Prince began as follows: You have overcome me, good Chancellor, with your agreeable discourse; and have kindled within my breast a more than ordinary thirst after the knowledge of the law. There are two things, nevertheless, which make me fluctu-

[1] King Charles the First, on the occasion of his trial, speaks of his being as conversant with the law of this country, as any private gentleman in his dominions. The necessity of the study of the municipal law to a Sovereign is inculcated in king James's *Basilicon Doron*, lib. ii. The subject is more fully discussed in Herebaschius' work, de Erudiendis instruendisque Principum liberis. There are some interesting particulars preserved in the Paston Letters, respecting the manner in which the father of the Prince, whom Fortescue is addressing, was brought up. (Vol. III. Articles declaratory of how the Earl of Warwick took charge of Henry the Sixth, when a minor.)

ate, so that, like a ship in a storm, I know not which way to direct my course. One is, when I recollect how many years students of the law are taken up, before they arrive at any competent knowledge of it: which discourages me, lest I employ all my younger years in like manner; another thing is, whether to apply myself to the study of the laws of England, or of the Civil Laws, which are so famous throughout the universe: for a kingdom ought to be governed by the best of laws, according to the philosopher, nature always covets what is best. Wherefore I would willingly attend what you advise in this matter. To whom the Chancellor: Sir! there is no such mystery in these things, as to require abundance of deliberation; and therefore I shall give you my thoughts upon the matter without keeping you in suspense.

CHAP. VIII.—*Such a Knowledge of the Law as is necessary for a Prince is soon to be acquired.*

THE philosopher, in the first of his Physics, says, "'Tis supposed that we then know every thing when we apprehend the causes and principles thereof as high up as the first elements:" upon which the Commentator observes, that by principles, Aristotle meant the efficient causes; that by causes, the final causes are intended, and by elements the matter and form: now in the laws there are not, properly speaking, matter and form, *these* being what go to the composition of natural things; but something analogous to it, however, *viz.*, certain elements, out of which they arise, as Customs, Statutes, or Acts of Parliament and the Law of Nature: whereof the laws of particular kingdoms consist, as natural things do of matter and form; what we read or write consists of letters which are called the elements of

Reading and Writing. As for the *Principia*, which the Commentator calls the efficient causes, these are no other than certain *Universalia*, which the learned in the law, as well as mathematicians, call Maxims,[1] in rhetoric they are called *Paradoxes*, the civilians call them *Rules of Law*. They are not discoverable by stress of arguments or logical demonstrations, but as is said (secundo *posteriorum*) by induction, by the assistance of the senses and the memory; wherefore, in the first of his Physics, Aristotle has it, that "principles are not made up of other things, nor one of another. But other things proceed from them;" wherefore, according to the same author, the first of his topics, it is, that "every principle carries its own evidence with it, so that there is no disputing with those who deny first principles:" because, as the same philosopher writes in the first of his Ethics, "Principles do not admit of proof by reason and argument." Whosoever therefore desires to get a competent understanding in any faculty of science, must by all means be well instructed in the principles thereof. For,

[1] Lord Bacon, in the preface to his Maxims, has detailed the advantages, which he supposes may result from collecting the rules and grounds dispersed throughout the body of the laws. But the benefit which science has received from the use of maxims is of a questionable nature, and the adoption of them is attended with danger wherever the ideas are confused. (Locke on the Human Understanding, Book IV., ch. 7) Perhaps there is a period in the progress of every system of laws, previous to which the formation of maxims will be productive of bad effects, as leading to the establishment of principles which it is not permitted to controvert, but which more enlightened views of law and jurisprudence would repudiate. (See further concerning the maxims of the English law, Sir I. Dodderidge's English Lawyer, and Doctor and Student, Dial. 1., ch. 8 and 9.)

by reasoning from these principles, which are universally acknowledged and uncontested, we arrive at length at the final causes of things. So that whoever is ignorant of these three—the principles, causes, and elements of any science—must needs be totally ignorant of the science itself; on the other hand, when these are known, the science itself is known, too, at least in general and in the main, though not distinctly and completely.

So, we judge that we know the law of God, in knowing what is faith, hope, charity, the sacraments, and God's commandments, leaving other mysteries in Divinity to those who preside in the Church. Wherefore, *our blessed Saviour* says to his disciples, "Unto you it is given to know the mysteries of the kingdom of God, but to others in parables, that, seeing, they might not see, and hearing, they might not understand." And the Apostle cautions, "Not to think of one's self more highly than we ought to think." (Rom. xii. 5 and 16.) And, in another place, "not to mind high things, not to be wise in our own conceits." So, my Prince, there will be no occasion for you to search into the *arcana* of our laws with such tedious application and study; it will be sufficient, as you have made some progress in grammar, to use the same method and proportion in the study of the laws. As to grammatical learning, which consists of *Etymology*, *Orthography*, *Prosodia* and *Syntax*, as so many springs or fountains running together to complete it, you are not so perfect a master, it is true, as to be acquainted with all the particular rules and exceptions comprehended under each of these; but yet that general knowledge of grammar, which you have acquired, is sufficient for your purpose, from whence you may be justly stiled *a grammarian*. In like manner you may be deemed a lawyer in some competent degree, when, as a learner, you shall be-

come acquainted with the principles, causes and elements of the law. It will not be convenient, by severe study, or at the expense of the best of your time, to pry into nice points of law; such like matters may be left to your judges and counsel, who in England are called Sergeants at Law, and others well skilled in it, whom in common speech we call Apprentices of the law: you will better pronounce judgment in your courts by others than in person: it being not customary for the kings of England to sit in court, or pronounce judgment themselves;[1] and yet they

[1] "*Proprio ore Rex nullus Angliæ judicium proferre usus est.*" This passage was quoted by Sir E. Coke, at the celebrated conference between the houses of Parliament, respecting the liberty of the subject, for the purpose of shewing that the king can do nothing in his public capacity, without the agency of some responsible minister. This is a principle of the highest political importance, and it is maintained by the greatest authorities of the law of England. (2 Inst. St. West. 1, where Sir E. Coke again relies upon the passage in the text; Impeachment of Lord Danby, for a letter written by the order of the King, 2 Hargr. St. Tr. Danby Memoirs; Harris's Car. II., Vol. V., p. 238; Answer to the King's Declaration, upon dissolving the Parliament, A. D. 1681, Vol. IV. Parl. Hist. Appendix; Harley's Vindication of the Rights of the Commons; Somers's Tracts, W. 3; Speaker Onslow's Note respecting Lord Somers's Answer to his Impeachment in Burnet's Own Times, Vol. IV. 468, 479; St. 12 and 13 W. 3, ch. 2, sec. 3.) When any judicial act is by a statute referred to the King, it is understood as required to be done in some court of justice, according to the law, for in the view which has been taken of this subject by our most eminent legal writers, the King has committed all his judicial authority to the several courts, and if any one would render himself to the judgment of the King in such case, where the King has committed all his judicial power to others, it would be to no effect. (2 Inst. 186; "Maun-

are called the king's judgments, though pronounced and given by others : as Jehoshaphat asserted, that "they judged

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dement del Roy," 3 Inst. 146; "Volunt le Roy," 4 Inst. 71, and what is there said respecting "Dominus Rex in camerâ sua;" 2 Inst. 46, "Nec super eum ibimus;" The Year Book, 2 Rich. III. fol. 11, and respecting the invalidity of an arrest by virtue of a personal warrant from the Crown, 2 Shower, 484.) Saint John observes, that although his Majesty is said to be the fountain of justice, and although all the justice within the kingdom flows from that fountain, yet it must run in certain and known channels. (Argument for Hampden, 1 Hargr. St. Tr.) With this Sir Robert Atkyns agrees, saying that the light of justice was in the King, but was afterwards settled in courts, as the light of God in the sun and moon. (Tract on the Ecclesiastical Commission.) The principle of the incapacity of the King of England to exercise any judicial function, was magnanimously asserted by Sir E. Coke, in the presence of King James, notwithstanding that infatuated monarch pronounced the doctrine to be treasonable. ("Prohibitions del Roy," 12 Rep.; 3 Lodge's Illustrations, 346.) It is true, that at a period before the principles of the Constitution were settled upon a solid basis, instances are to be found, in which the kings of this country have personally assisted in the administration of justice. (Dial. de Scacc., lib. i., sec. 4; Maddox's Exchequer, ch. 3; Barrington's Observations on 17 Edw. IV.; Reeve's History of the Law, Edw. IV.; Henry's History, Vol. V., p. 382; 3 Bl. Comm. 41, n.; Paston Letters, Vol. IV., p. 77, Vol. II., p. 275, and concerning the right arrogated by James, of presiding in the Star Chamber, Brodie's British Empire, Vol. I., p. 193.) Examples also of an interference on the part of the Crown, with the ordinary course of justice, may be adduced from the records of the Exchequer, which evince the expediency of every distinct provision, contained in the famous clause of Magna Charta, "Nulli negabimus, nulli vendemus, nulli differemus justitiam aut rectum." (Maddox's Exch., ch. 12, sec. 6.) Instances

not for man, but for the Lord, who was with him in the judgment." (2 Chron. xix. 6.) Wherefore, most gracious Prince, you will soon, with a moderate application, be suffi-

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likewise in which the Sovereign has tampered with the public dispensers of justice, are to be met with in different periods of English history; and an indelible stigma is affixed to the house of Stuart, for having eclipsed every preceding and subsequent dynasty, in the shamelessness of the practice, and in the enormities of which they made it the instrument. (Luder's Tract on the Station and Character of the Judges in the 16th and 17th centuries; Foster's Discourses, 199, 200; Bacon's Letters; Burnet's Own Times, Vol. I., p. 272.) So far, however, is the English Constitution abhorrent from any influence, which the Crown might exercise in the administration of justice, that the Judges are expressly prohibited by their oath, from obeying any injunctions, which may interrupt them in the discharge of their duties. (2 Inst. 56; 2 Edw. III., c. 8; 14 Edw. III., St. 1, c. 14; 20 Edw. III., c. 1 and 2; 11 Rich. II., c. 10. See also Lord Somers on Grand Juries, p. 111 et seq.) The Statutes, which require the Judges to persevere in this independent line of conduct, may be enforced by means of a particular writ, entitled "De Procedendo in Judicium." (Fitz. Nat. Brev. 153 *b*, 240 *d*.) The observation of these laws was impressively enjoined on all her Judges, by Queen Elizabeth; and upon two remarkable occasions in her reign, she admitted the validity of the reasons they assigned, for refusing to be governed by her directions, in matters of judicature before them, contrary to their oaths. (Pref. to 2nd Rep.; Anderson's Rep., p. 297 et seq.; Cavendish's Case, ibid. p. 152; Petyt. Jus Parliamentarium, pp. 203, 204, and on the subject of Queen Elizabeth's Warrants, 15 vol. Rymer's Fæd. and 1 Brodie's British Empire, p. 291.) The spirited demeanor of Sir E. Coke, in maintaining the inviolability of his oath, upon this important point, on the occasion of the case of Commendams, has reflected immortal honor upon his name: whereas the compul-

ciently instructed in the laws of England, if so be you give your mind to it. Seneca, in an epistle to Lucillus, says, "There is nothing but what great pains and diligent

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sion arising from the expression of the Royal will, has never been deemed sufficient to justify or excuse the conduct of the administrators of justice; for it would have the effect of extending to them the prerogative of doing no wrong. (Oldcastle's Remarks on English History, Letter 7; Proceedings against Herbert, Attorney General, tem Car. I., 3 Brodie's British Empire, p. 305; and see a Letter of Gardiner to the Protector Somerset in Petyt. Jus Parl., p. 200.) Since the Revolution, the independence of the judicial power of the State has been maintained with considerable success. The change which has taken place in the patents of the Judges, has divested the Crown of its hold upon the fears, whatever influence may be left to it, upon the hopes of the bench; and although the practice did not cease at so early a period of requiring the extrajudicial advice of the Judges, as the Counsellors of the Sovereign, upon matters which might afterwards be submitted to them, in their judicial capacity, yet this invidious prerogative has been long unexercised. The injustice of such an auricular taking of opinions, as Sir E. Coke denominates it, was properly felt and expressed by Chief Justice Hussey, in the reign of Henry the VIIth; and in commenting upon the language of that Judge upon this subject, Sir E. Coke asks, "How can they be indifferent, who have delivered their opinions beforehand, without hearing of the party, when a small addition or subtraction may alter the case; and how does it stand with their oath?" (3 Inst. 29 and 30; Case of Lord George Sackville's Court Martial, A. D. 1760; Appendix to Eden's Reports; Proceedings at Carlisle, in the trials of the Rebels, A. D. 1715. Vol. III. Ellis's Original Letters; and see respecting the Law and Precedents upon this subject, Hargr. Co. Litt. 110 *a*, 129 *a*; Fortescue's Rep., p. 300. For the ancient instances, see particularly the cases of Ship Money, and of the Regicides; also L -

care will get the better of." I know very well the quickness of your apprehension and the forwardness of your parts; and I dare say, that in those studies, though a knowledge and practice of twenty years is but barely sufficient to qualify for a judge,[1] you will acquire a knowledge sufficient for one of your high quality, within the compass of one year; and in the mean while attend to, and inure yourself to martial exercises, to which your natural inclination prompts you on so much, and still make it your diversion, as shall best please you, at your leisure.

Chap. IX.—*A King whose Government is Political can not change the Laws.*

The next thing, my Prince, at which you seem to hesitate, shall, with the same ease, be removed and answered, that is, whether you ought to apply yourself to the study of the Laws of England, or to that of the Civil Laws, for that the opinion is with them every where, in preference to all other human laws: let not this difficulty, Sir! give you any concern. A King of England can not, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased, in the laws of the kingdom, impose *tallages*[2] and other hardships upon the

der's on Treasons. In Hargrave's Preface to Hale's Jurisdiction of the Lords, p. 48, is detailed a remarkable secret conference between Charles I. and his Judges, preparatory to passing the Petition of Right.)

[1] "*Lucubrationes viginti annorum.*"

[2] "Tallagia." In Sir E. Coke's commentary upon the disputed statute "*de tallagio non concedendo*," it is observed that *talla-*

people, whether they would or no, without their consent, which sort of government the Civil Laws point out, when they declare *Quod principi placuit legis habet vigorem:* but it is much otherwise with a king, whose government is political, because he can neither make any alteration, or change in the laws of the realm without the consent of the subject, nor burthen them, against their wills, with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other: the same things may be effected under an absolute prince, provided he do not degenerate into the tyrant. Of such a prince, Aristotle, in the third of his Politics, says, "It is better for a city to be governed by a good man, than by good laws." But because it does not always happen, that the person presiding over a people is so qualified, St. Thomas, in the book which he wrote to the king of Cyprus, (De Regimine Principum,) wishes, that a kingdom could be so instituted, as that the king might not be at liberty to tyrannize over his people; which only comes to pass in the present case; that is, when the sovereign power is restrained by political laws.

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gium is a general word including all subsidies, taxes, tenths, fifteenths, impositions, or other burthens or charges." For the meaning of tallage, according to a more confined use of the expression, see Maddox's Exchequer, ch. 17. An enquiry into the history of the imposition of tallage, properly so called, is calculated to throw considerable light on the early representation of boroughs, and on the distinction anciently existing between the taxes levied on shires, and those according to which other divisions of the country were assessed. (Report of the Lords' Committees respecting the Peerage, pp. 239, 271; Luder's Tracts, Vol. II., p. 307; Hallam's Middle Ages, Vol. II., pp. 239, 240.)

Rejoice, therefore, my good Prince, that such is the law of that kingdom to which you are to inherit, because it will afford both to yourself and subjects *the greatest security and satisfaction*. With such a law, saith the same St. Thomas, all mankind would have been governed, if, in the Paradise, they had not transgressed the command of God. With the same was the whole nation of the Jews governed, under the *theocracy*, when God was their king, who adopted them for his peculiar people: till, at length, upon their own request, having obtained another sort of king, they soon found reason to repent them of their foolish and rash choice, and were sufficiently humbled under a *despotic* government;[1] but when they had good kings, as some there were, the people prospered and lived at ease; but when they were otherwise, their condition was both wretched and without redress. Of this you may see a particular account in the book of the Kings. This subject being sufficiently discussed in a small piece I formerly drew up on purpose for your use, concerning the Law of Nature, I shall forbear at present to enlarge.[2]

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[1] This circumstance in Jewish history did not escape the writers on the side of the Parliament, in the time of the civil war; and they have accordingly availed themselves of it with much ingenuity. (See Milton's Tenure of Kings and Magistrates; and the Defensio pro Populo Anglicano.) The reader will find some curious observations respecting the theocracy of the Jews, by the eccentric author of the Oceana, in his Treatise upon the Art of Lawgiving, Book II.

[2] This chapter is very memorable on account of the repeated reference which has been made to it, in arguing many great constitutional questions in Parliament, and in the Courts of Westminster Hall. In the struggle which was maintained in the reign of James, against arbitrary impositions at the Ports, great stress

CHAP. X.—*The Prince proposes a Question.*

Prince. How comes it to pass, my Chancellor, that one king may govern his subjects in such an absolute manner,

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was laid upon the authority of Fortescue, in this part of his work. The Judges who formed a conspicuous exception to a profligate bench, that abandoned the liberties of the nation in the celebrated case of Ship Money, founded their arguments on the principles of the Constitution which are here maintained; and made a proud appeal to the writings of the Chancellor of Henry the Sixth. Indeed, whoever will examine the collection of the State Trials and the parliamentary history, with this view, will be satisfied that the benefit which the nation has derived from the legal authority of Fortescue, in settling the prerogative on a basis at once advantageous to the subject and secure to the Prince, is not inferior to that for which it is indebted to the philosophical reasonings of Locke.

That this fundamental principle in the English Constitution, of no man being compelled to relinquish his property without his consent, was a part of the Mos Majorum prevalent in this country from the earliest times, can not be proved by a more unimpeachable authority than Fortescue; in confirmation of whom Sir E. Coke repeats in several parts of his works the following maxim of the common Law, "Le commun ley ad tielment admeasure les prerogatives le Roy que ilz ne tollerent ne prejudiceront le inheritance d'ascun." (2 Inst. 63; 3 Inst. 84. See also Plowden, 230.) The same principle is also explicitly and energetically promulgated by the ancient Statute Law of this realm: if the laws of the Conqueror are of too remote and too doubtful authority to be relied upon in the consideration of this question (See Observations on the Magna Charter of William, Hallam's Middle Ages, Vol. II., p. 175.) If the Magna Charta of King John, when viewed in conjunction with the charters of the succeeding Prince, does not form a basis sufficiently solid and unobjectionable for the

and a power in the same extent is unlawful for another king: seeing kings are equal in dignity, I am surprised that they are not likewise equal in the extent and exercise of their power.

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purpose. (See Observations on the Clause respecting Scutage in the Charter of John, in the Report of the Lords' Committees respecting the Peerage.) If the Statute "De Tallagio non concedendo," be rejected by antiquarians of the highest name. (Blackstone on the Charters, Barrington, Reeves.) Yet the common right of the kingdom in this respect is expressed in many ancient Acts of Parliament, in a manner scarcely less positive and distinct than it is enunciated in the Petition of Rights and the Bill of Rights. (Preamble to the Petition of Rights; Barrington's Observations on the Statute of Confirmatio Chartarum, 2 Inst. 530, 532; Debate on the Case of Impositions, 11 Harg. St. Tr., Case of Benevolences, ibid.) The examples of danegelt, hydage, murage and pontage, and the ancient customs on which are founded the chief arguments that were urged in support of prerogative taxation during the reign of the Stuarts, have been satisfactorily explained and answered. (See the Arguments on the Cases of Ship Money and Impositions in the State Trials; that the antiqua custuma had their commencement by Act of Parliament, 2 Inst. 59.) Instances are no doubt to be met with, in which the Crown has attempted to arrogate to itself the power of taxing the subject under the disguise of legal shadows and devices, as by grants to merchants, given for some equivalent advantage conferred on themselves, by loans and privy seals, by commissions under the pretence of State necessity, by dispensations with penal laws, by impositions in the way of ordinance of Parliament, by monopolies, by benevolences levied compulsorily, or with an appearance of free will—all of which crafty stratagems have been reprobated and repressed in Specific Statutes, enacted on the occasion of the particular grievance; and to obviate every subtle contrivance, through which the Sovereign, by means of any sin-

CHAP. XI.—*The Chancellor for Answer refers the Prince to his Treatise concerning the Laws of Nature, where the aforesaid Question is handled at large.*

Chancellor. I have, Sir! in the small piece referred to, sufficiently made appear, that the king who governs by

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ister inducement, might obtain money from the subject without the consent of Parliament, it seems to be settled by the legislature that all commissions from the Crown, to solicit and receive gifts, however voluntarily bestowed, are unconstitutional. (Hakewell's Argument in the Case of Impositions, and Hargrave's notes upon that Case and the Case of Benevolences, in his edition of the State Trials. For the Law as settled after the Restoration, see Stat. 12 Car. II., c. 4, sec. 6; 13 Car. II., c. 4.) It has been properly observed that the Constitution of this country is to be judged of by its laws, and not by particular instances which are to be found of the infraction of them, "judicandum est legibus non exemplis." But even the precedents which have usually been adduced in favor of the existence of the power of arbitrary taxation in England, have been greatly misrepresented. Mr. Brodie, in a recent publication, has exposed many of the prevalent errors upon this subject, which are to be found in the writings of Hume. The greater part of the examples in which the subject's right has been violated, are, when viewed together with all the concomitant circumstances of the occasion, of a very doubtful and qualified nature: while the authorities on the other hand which manifest the restraint upon the prerogative, in this respect, are numerous and conclusive. Kings of England have abstained from imposing taxes without the consent of Parliament, at times when every inducement was operating on their minds to resort to such a course had it been lawful: they have solicited assistance from the bounty of individuals and of Parliament, without any salvo of their right: moneys which the crown has obtained without the

political rules has no less power than him, who governs his subjects at his mere will and pleasure; yet, that the author-

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common consent, have been recovered by suits at law: Kings have acknowleged in Parliament the impropriety of their infringing upon this undoubted privilege of the subject. Even that arbitrary monarch, Henry the Eighth, withdrew a commission which he had of his own authority issued to levy a tax upon the kingdom, and laid the blame upon his Minister Wolsey, of that flagrant encroachment of the prerogative. Judge Hutton, in delivering his judgment upon the case of Ship Money, relates that Queen Elizabeth, a sovereign no less jealous of power than her father, sent her Privy Counsellors to all parts of the kingdom to countermand a commission which had been issued for levying a tax as soon as she was convinced of its illegality; the same Judge mentions that he as well as the others, who were forced to contribute on that occasion, had the sums which had been exacted refunded to them. This important constitutional principle was vigilantly guarded at the period of the Revolution by a particular clause in the Bill of Rights; and it was a laudable measure of the Parliament of William, to determine that he was to receive the revenue of the Crown as a gift from themselves, and not by way of succession from his predecessor. It has been justly observed by Burke, that the same attempts will not be made against a Constitution fully formed and matured, that were used to destroy it in the cradle, or to resist its growth during its infancy. But if any rash individual shall in future times harbour a thought of abetting a Sovereign of this country, in the long abandoned claim of arbitrary taxation, the impeachment of the Judges who concurred in the illegal proceedings against Hampden will afford him an awful, but not a solitary example in the annals of this country of the punishment which the national justice denounces against such persons as have yielded themselves to be the instruments of despotic power in taking from the people of England what they have not consented to give.

ity which each has over their subjects is vastly different, I never disputed. The reason of which, I shall, in the best manner I can, endeavour to explain.

But it is obvious that the liberties of a country, however cautiously they are provided for by existing institutions, would remain in an insecure condition, if it were in the power of the Sovereign to change the laws, or to suspend or dispense with them at his pleasure. It is upon the restrictions with which the prerogative is bound in this respect, that Fortescue, in the present chapter, grounds his eulogium on the permanent advantages and the safety of the English Constitution. Before the time when Fortescue wrote, a king of England had attempted to invalidate a Statute on the ground that he only dissembled when he gave his assent to it. "Dissimulavimus, sicut oportuit, et dictum pretensum statutum sigillari permisimus hac vice." (Barrington's Observations on the 15 Edw. III. See also his remarks on 10 Rich. II.) And an attempt had been made by a Prince of Wales, to impede the operation of a Statute by a particular entry upon the Parliament roll. (3 Inst. 325; Ruffhead's Preface to the Statutes; Lord Macclesfield's Trial, Sergeant Pengelley's Reply.) And several of our Kings had not scrupled to imitate a scandalous device first introduced in support of the Papal usurpations, that of evading the laws of the country by means of a "non obstante." (Sir R. Atkyns on the Dispensing Power; Luder's Tract on the same Subject.) But the authority of Fortescue will be noticed as being strikingly repugnant to such illegal and unworthy practices: and when he was Chief Justice he vindicated, by his conduct, the opinions which his book contains; for in the Star Chamber he strenuously opposed an appointment of the Crown, which had been made in contravention of a Statute of the realm. (2 Inst. 559.) It is true that some great lawyers have recognized the legality of the dispensing power in special cases, and within particular limits: and under these restrictions it is

Chap. XII.—*How Kingdoms ruled by Regal Government first began.*

Formerly, men who excelled in power, being ambitious of honor and renown, subdued the nations which were round about them by force of arms; they obliged them to a state of servitude, absolutely to obey their commands, which

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treated as indisputably appertaining to the Crown by Sir E. Coke. (Co. Litt. 120; 3 Inst. 154; Sir T. Smith de Rep., lib. ii., c. 3; Thomas *v.* Sorrel, Vaughan's Rep., and the references in Hargr. Co. Litt. 120 *a.*, n. 3 and 4. See a Dispensation by Letters Patent in Fortescue's time for discovering the Philosopher's Stone, 4 Inst. 74.) But he has pointed out many pernicious effects arising from the exercise of it; and on an important occasion, he reprobated, in the most forcible manner, the notion that a general power of altering the laws was a part of the royal prerogative, supporting his opinion mainly upon what Fortescue has written on the subject in the present chapter. (Case of Proclamations, 12 Rep. See also 3 Inst., ch. 86.) The doctrine in the text is utterly inconsistent with the position advanced by Chief Justice Herbert, in the time of Charles II., "that the laws of England are the King's laws, and that therefore it is the inseparable prerogative of the Kings of England to dispense with them. But is in complete unison with the principles of the Constitution, as established by the Bill of Rights; according to which the dispensing and suspending powers, except where they are specially conferred by Parliament, are abolished, whatever shape they may assume, or under whatever pretext they may be veiled. (See further, on this subject, Atkyns on the Dispensing Power; Hurd's Dialogue on the Constitution; Cases of Sir Edward Hales, and of the Seven Bishops, in the State Trials; Proceedings in Parliament relative to the Declarations of Indulgence, tem. Car. II., and Jac. II., Clarke's Stuart Papers, Vol. II., p. 80; and see

they established into laws, as the rules of their government. By long continuance and suffering whereof, the people, though under such subjection, finding themselves protected by their governors from the violence and insults of others, submitted quietly to them, thinking it better to be under the protection of some government, than to be continually exposed to the ravages of every one who should take it in their heads to oppress them. From this original and reason some kingdoms date their commencement, and the persons invested with the power, during such their government, from ruling (*regendo*), assumed and usurped to themselves the name of Ruler or King (*Rex*), and their power obtained the name of Regal. By these methods it was that Nimrod first acquired to himself a kingdom, though he is not called a king in the Scripture, but *a mighty hunter before the Lord.* For, as an hunter behaves towards beasts, which are naturally wild and free, so did he oblige mankind to be in servitude and to obey him. By the same methods Belus reduced the Assyrians; so did Ninus by the greatest part of Asia: thus the Romans arrived at universal empire: in like manner kingdoms began in other parts of the world. Wherefore, when the children of Israel desired to have a king, as all the nations round about them *then* had, the thing displeased God, and he commanded Samuel to shew them the manner of the king who should reign over them, and the nature of his government; that is, mere ar-

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Hargr. Co. Litt. 120 *a.*, n. 4, the peculiar manner in which the Dispensing and Suspending Powers are noticed in the Declaration of Rights and the Bill of Rights. For the Proceedings in Parliament after the Revolution with respect to the dispensing Power, see Gray's Deb., Vol. IX., p. 297 to 307, 314 to 332, 336 to 344, 396; Chandl. Deb., Vol. I., p. 394.)

bitrary will and pleasure, as is set forth at large, and very pathetically, in the first Book of Samuel. And thus, if I mistake not, most excellent Prince, you have had a true account how those kingdoms first began, where the government is merely Regal: I shall now endeavour to trace the original of those kingdoms, where the form of government is Political; that so, the first rise and beginning of both being known, you may more easily discern the reason of that wide difference which occasioned your question.

CHAP. XIII.—*How Kingdoms ruled by Political Government first began.*

ST. AUGUSTINE, in his book, *De Civitate Dei*, has it, "That a people is a body of men joined together in society by a consent of right, by an union of interests, and for promoting the common good;" not that a people so met together in society can properly be called a body, as long as they continue without a head; for, as in the body natural, the head being cut off, we no longer call it a body, but a *trunk;* so a community, without a head to govern it, can not in propriety of speech be called a body politic. Wherefore, the philosopher, in the first of his Politics, says, "Whensoever a multitude is formed into one body or society, one part must govern, and the rest be governed." Wherefore, it is absolutely necessary, where a company of men combine and form themselves into a body politic, that some one should preside as the governing principal, who in kingdoms goes usually under the name of King (*rex, à regendo*). In this order, as out of an embryo, is formed an human body, with one head to govern and control it; so, from a confused multitude is formed a regular kingdom, which is a sort of a mystical body, with one person, as the head, to guide and

govern. And, as in the natural body (according to the philosopher) the heart is the first thing which lives, having in it the blood, which it transmits to all the other members, thereby imparting life, and growth and vigour; so, in the body politic, the first thing which lives and moves is the intention of the people, having in it the blood, that is, the prudential care and provision for the public good, which it transmits and communicates to the head, as the principal part; and to all the rest of the members of the said body politic, whereby it subsists and is invigorated. The law under which the people is incorporated, may be compared to the nerves or sinews of the body natural; for, as by these the whole frame is fitly joined together and compacted, so is the law that ligament (to go back to the truest derivation of the word, *lex à ligando*) by which the body politic and all its several members are bound together and united in one entire body. And as the bones and all the other members of the body preserve their functions, and discharge their several offices by the nerves, so do the members of the community by the law. And as the head of the body natural can not change its nerves or sinews, can not deny to the several parts their proper energy, their due proportion and aliment of blood; neither can a king, who is the head of the body politic, change the laws thereof, nor take from the people what is theirs, by right, against their consents.[1] Thus you have, Sir, the formal institution of

[1] In Hobbes's Leviathan, a metaphor is pursued at great length, which closely resembles the one contained in the text; and in another part of his singular work, that writer explains the generation of the great Leviathan, or a commonwealth, very much in the same manner that Fortescue accounts for the origin of a State. But these authors are at total variance, in the principles of gov-

every political kingdom, from whence you may guess at the power which a king may exercise with respect to the laws and the subject. For he is appointed to protect his subjects in their lives, properties and laws; for this very end and purpose he has the delegation of power from the people; and he has no just claim to any other power but this. Wherefore, to give a brief answer to that question of yours concerning the different powers which kings claim over their subjects, I am firmly of opinion that it arises solely from the different natures of their original institution, as you may easily collect from what has been said. So the kingdom of England had its original from Brute and the Trojans, who attended him from Italy and Greece, and became a mixt kind of government, compounded of the *regal* and political.[1] So Scotland, which was formerly in subjec-

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ernment, which they deduce from their views of the formation of society. (See Clarendon's Survey of the Leviathan, for the Propositions contained in that work which are subversive of liberty, p. 190.)

[1] "Brute and the Trojans." This hero was supposed to be the great grandson of Æneas: the first account of him is in the History of Geoffrey of Monmouth, who, in the reign of Henry the Second, published a history of Britain, translated, as he pretends, out of the British tongue. The story may be perused in most of the old Chronicle writers, and even Milton has introduced it into his History of England: Whitelocke, in his notes upon the Parliamentary Writ, gravely rests a part of his speculations upon the truth of that tradition; and some writers have been so persuaded of the real existence of this personage, as to engage in a controversy, respecting his coat of arms. The city of London availed themselves of the fiction, in several of their petitions, for the purpose of referring the origin of their customs and privileges to the times of ancient Troy. Camden, in his Britannia,

tion to England in the nature of a dutchy, became a government partly regal, partly political.[1] Many other kingdoms, from the same original, have acquired the same form of government; whence Diodorus Siculus, in his second book of Ancient History, concerning the Egyptians, says thus: "The kings of Egypt originally did not live in such a licentious manner as other kings whose will was their law: but were subject to the same law, in common with the subject, and esteemed themselves happy in such a conformity to the laws." For, it was their opinion that many things were done by those who gave a loose to their own

says, "That to reject the story, would be to wage war against time, and fight against a received opinion;" he has, however, adduced several arguments, which divest the tradition of every title to belief. The circumstances of the history of Brute have suggested to several persons the design of an epic poem, and have been frequently celebrated in verse. (Lord Teignmouth's Life of Sir W. Jones, Appdx.; Johnson's Life of Pope, p. 84; Verses of Gildas in Virunnius's History, p. 6; Drayton's Polyolbion. And see further concerning this story, Selden's Notes to Drayton's Polyolbion; Leyland's Assertio Arturii, p. 8; Sir W. Temple's History of England; Letter of Edw. I. to Pope Boniface, X Scriptt. 2483; for the Claim of the City, Stow's Survey, p. 6.)

[1] The question respecting the subjection of Scotland to the English Crown has given rise to a multitude of treatises, and has been advocated on different sides, by authors of high literary reputation. A short statement of the authorities, upon which the question depends, will be found in Dr. Duck's Treatise, "De Usu et Auctoritate Juris Civilis:" and it is a necessary caution, in reading the text of Fortescue, to bear in mind that Rapin, who collects the proofs at large, on both sides, in his history, decides the case in favour of the Scotch.

will, which exposed them to frequent and great dangers and disadvantages.[1] The same author in his fourth book writes thus: "He who is chosen king of Ethiopia leads a life conformable to the laws, and behaves in every respect according to the customs of his country, neither rewarding or punishing any one; but according to the laws handed down from his predecessors." In like manner he writes concerning the king of Saba in Arabia Felix: in the same manner concerning other kings in ancient history; who, pursuing the same methods of government, reigned prosperously and with reputation.

CHAP. XIV.—*The Prince abridges what the Chancellor had been discoursing of in the two foregoing Chapters.*

Prince. You have, my good Chancellor, with the perspicuity of your discourse, dispelled that darkness with which my understanding was obscured, and I now perceive plainly, that no nation ever formed themselves into a kingdom by their own compact and consent, with any other view than this, that they might hereby enjoy what they had, against all dangers and violence, in a securer manner than before: and consequently, they would find themselves dis-

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[1] With the same sentiments, Voltaire writes to the king of Prussia.

Ouvrons du monde entier les annales fideles,
Voyons-y les tyrans; ils sont tous malheureux:
Les foudres qu' ils portaient dans leurs mains criminelles
Sont retombés sur eux.
Ils sont morts dans l'opprobe, ils sont morts dans la rage—
Mais Antonin, Trajan, Marc-Aurele, Titus,
Ont eu des jours sereins, sans nuit et sans orage,
Purs comme leurs vertues.

appointed of their intention, if afterwards the king they had so set over them should despoil them of their properties, which was not lawful for any of the community to do before such appointment made. And the people would be in yet a more dismal state, in case they were to be governed by *strange* and foreign laws, such as they had not been used to, such as they could not approve of: more especially if those laws should affect them in their properties, for the preservation whereof, as well as of their persons, they freely submitted to kingly government; it is plain, that such a power as this could never originally proceed from the people; and if not from them, the king could have no such power rightfully at all: on the other hand, I conceive it to be quite otherwise with that kingdom which becomes so by the sole authority and absolute power of the king. In this case, the people become subject to him upon no other terms, but to obey and be governed by his laws, that is, his mere will and pleasure. Neither, Sir, has it slipt my memory, what you have elsewhere, with solid reasons demonstrated in your treatise, concerning the Law of Nature, that the power of both kings is in effect equal; seeing a possibility of doing amiss, which is the only privilege the one enjoys above the other, can be called an addition of power, any more than a possibility to decay or die; which, as it is only a possibility of being deprived of something valuable, such as life or health, is for this reason rather to be called a *state of impotency*, a real weakness. "For power (as Boetius observes) is always for some good end or purpose;" and therefore to be able to do mischief, which is the sole prerogative an absolute prince enjoys above the other, is so far from increasing his power, that it rather lessens and exposes it. The *blessed spirits* above, which

are already fixed in their seats of happiness, and put beyond a possibility of sinning, are in that respect superior to us in power, who are always liable to do amiss, and to work iniquity with greediness. It only now remains to enquire, whether the law of England, to the study whereof you invite me, be as well adapted and effectual for the government of that kingdom, as the Civil Law (by which the holy Roman Empire is regulated) is generally thought to be for the government of the rest of the world. Satisfy me but in this point by some clear and convincing proof; and I will immediately apply myself to the study you propose, without troubling you with any more of my scruples.[1]

[1] Fortescue, in the preceding chapters, attempts to account for the characteristic principles of the English Constitution, by referring to the circumstances, which he supposes to have attended the first institution of civil government in the Island: so most authors, who have written upon the subject of political institutions, have founded their theories on an imaginary state of nature, out of which they suppose men to have passed into a state of civilized society. The descriptions which have been given of a state of nature, are as various as the systems of which it has formed the basis. Hobbes, Locke and Rousseau, all differ from each other, in the manner in which they represent this condition of mankind; whilst other writers, apparently with more reason, have considered the idea of a state of nature to be altogether negative. The confused and contradictory notions of Blackstone, respecting the institution of government, as arising out of the state of nature, have been ably animadverted upon by Mr. Bentham; and the subject has been discussed with much talent, in an interesting treatise by a foreign writer, upon the influence of political theories in modern Europe. (Heeren, ueber die Entstehung, die Ausbildung und den praktischen einfluss der politischen theorieen in

CHAP. XV.—*All Laws are the Law of Nature, Customs or Statutes.*

Chancellor. I observe, Sir, that you have given attention, and remember well what I have hitherto been dis-

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dem neueren Europa.) It will perhaps be thought that the political order which we contemplate in England, is not to be attributed to the circumstances that accompanied the transition of our ancestors from out of the state of nature to one of social life and civil government; nor to any balance between the monarchical, aristocratical and democratical powers, which the sagacity of our forefathers may have framed; but that it has been the gradual result of time and experience; the passions and the wants of man combined with the various emergencies of his situation. It is true, that the prudence and good sense of our countrymen have always made them slow to adopt any alteration of institutions, which have been found not incompatible with national happiness, if not productive of it in themselves, during a succession of ages; that they have indignantly resisted every attempt at innovation in their government, by arbitrary means: and accordingly the paradox of Fielding, "that the Constitution of this Island is nothing fixed, but just as changeable as the weather," may be thought to have been deservedly reprobated by Sir. W. Jones. Nevertheless, it will probably be considered, if we trace the progress of our Constitution, that its principal advantages have arisen from the frequent occasions upon which it has yielded to the changes prescribed by public opinion. We may, consequently, hesitate to adopt the account, which is given in the text, of the formation of the English Constitution: but no praise can be too ample for the explanation which Fortescue has left us, of the principles which, in mixed monarchies, ought to influence the governors and governed, and which constitute the sole legitimate ground of the subject's obedience. The true "tenure of Kings and Magistrates"

coursing upon, therefore you have the better title to receive an answer to your question. Know then, that all human

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is not less explicitly and boldly asserted, in the preceding chapter, by the Chancellor of Henry the Sixth, than by the immortal advocate of the English people. The sentiments of Algernon Sidney were not more inimical to the power of tyrants, or more repugnant than those of Fortescue to the abject language of the Oxford decree, or that which disturbed the last moments of Russell. And when the Chancellor writes, "Ad tutelam legis subditorum, ac eorum corporum et bonorum Rex hujusmodi erectus est, et hanc potestatem a populo effluxam ipse habet, quo ei non licet potestate aliâ suo populo dominari," he maintains the same fundamental principle of government, which, when it was developed and vindicated by Locke, ensured to that great philosopher the lasting gratitude of his country and the admiration of Europe. It is important to observe the entire absence from the writings of Fortescue, of those obscure and mystical definitions of the prerogative, which, in after times, had such a fatal influence in preventing the King and the people from understanding, and thereby appreciating each other's rights, as being, in fact, their own. The simple description of royal power given in the text, is incompatible with the metaphysical distinction of James, between a king in abstracto and a king in concreto; nor does it more accord with the notions respecting the prerogative promulgated by Cowell, and for which he incurred the censure of the Parliament; and it is totally inconsistent with the doctrine, that the little finger of the King is heavier than the loins of the law, and that every political institution and regulation must give place to the prerogative, as being endued in this respect with power, like that of the strong man Samson, who, though he was bound by his own consent, could not be held under restraint when an emergency arose. (The Trew Law of Free Monarchies, and Speech at Whitehall, A. D. 1609, K. James's Works; Cowell's Interpreter, Art. Prerogative, Parliament, King; Sir J. Davis on Impositions; Straf-

laws are either the Law of Nature, Customs, or Statutes, which are also called Constitutions: but the two former,

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ford's Impeachment, St. Tr. Strafford's Letters and Disp., Vol. II., p. 388, Letter to Judge Hutton.) The King's prerogative is nothing more than the King's law: "for example," says Selden, "if you ask whether a patron may present to a living after six months by law, I answer no; if you ask whether the King may, I answer he may by his prerogative, that is, by the law that concerns himself in that case." (Selden's Table Talk, Tit. Prerogative; Resolution of the Judges in the Case of Proclamations, 12 Rep.; "Political Reflections," by Saville, Lord Halifax.) Locke has observed, that in the infancy of Commonwealths, the Government is almost all prerogative. The restrictions which are subsequently imposed upon the executive power, are to be regarded as improvements in the legislation of the country, tending to confine the authority of the chief magistrate to such a measure and extent as is indispensable for the proper execution of his trust; they can not reasonably be deemed invasions upon his established rights. And therefore a Prince of the Stuart family could have no just claim to the extensive prerogatives enjoyed by the Tudor line, when it became manifest that the sentiments of the nation were averse to his possessing them. A wise people will foresee numberless evils, of a frightful character, that may arise from a rash diminution of the prerogative: a free nation will never suffer themselves to be told that they do not possess a legitimate right to alter, to curtail, or to annihilate it. The doctrines in the text were not propagated for the first time by Fortescue, with the intention of captivating the affections of his countrymen, in favour of an exiled Sovereign, as Sir John Finch suggested; but they will be found to be no less unequivocally asserted in the more ancient treatises of Bracton and Fleta. (See the principal Passages to this effect in these authors, referred to in Hallam's Middle Ages, c. 8; Milton's Defensio Pro. Pop. Angl.; and Hurd's Dialogue on the Constitution. The Mirror regards

when they are reduced into writing, and made public by a sufficient authority of the Prince, and commanded to be ob-

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the King as being under the protection of the Law, in the same manner as an Infant, ch. 4, sec. 22.) And the same opinions are maintained by Fortescue, in his work upon political monarchy, which he published after his reconciliation with Edw. IV. The notion of the divine right of kings had indeed been promulgated in England, previous to the time when Fortescue wrote. (Bishop of Carlisle's Speech on the Deposition of Rich. II.; Hayward's Life of Henry IV.) A parliamentary title to the throne, however, became established on more than one signal occasion. (Brief History of the Succession, Somers's Tracts; Discourse iv. in Foster's Crown Law.) And the deference to the authority of Parliament, evinced by princes in the heat of victory, in the raptures of a successful Revolution, and before the armies could be disbanded, had stampt a remarkable feature on the early history of this country. (Oldcastle's Remarks on English History, Letter 8.) Neither did the opinion of a divine and indefeasible right in kings, make much progress until a comparatively late period. Sir Thomas More, in a remarkable discourse, which he held with the Solicitor General, respecting the supremacy, treats the subserviency of the right of the Crown to that of Parliament, as a truth not to be disputed; and by an early Statute of Elizabeth, it was made treason to call in question the power of Parliament to alter the succession. It has been conjectured, that the circumstances which attended the reception of the Reformation into England, first rendered prevalent this opinion. (Hurd's Dial. on the Constitution.) The peculiar nature of the title of the house of Stuart to the throne, may have contributed materially to disseminate it. (Burnet's Own Times, last Edition, Vol. III. 382 n.; Hargrave's Preface to Hale's Jurisdiction of the Lords, 145 n.; Luder's Tract on the Will of Hen. VIII.) It is called, in a speech of Lord Shaftsbury's, a Laudean Doctrine; and certainly that prelate conspired with his Sovereign to sanction the deliv-

served, they then pass into the nature of, and are accepted as constitutions or statutes, and, in virtue of such promul-

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ering of tenets so heinous in their nature from the pulpit: a profanation of the religious feeling of the country, only to be paraleled by the introduction of them as articles into national oaths. (Transactions respecting Manwaring and Sibthorp, Tem. Car. I.; Progress of Arbitrary Power, by Andrew Marvel; Letter from a Person of Quality, Tracts Tem. Car. II.; Debate about the Subscription to Passive Obedience in Echard's History, Vol. III., p. 379 et seq., and Act of Uniformity, the Corporation Act, Militia Act, and Five-Mile Act.) It is to a convocation held in the time of James I. that the origin of the patriarchal theory of government is to be referred; which, when it was afterwards supported by Filmer, had a practical influence, and acquired a celebrity, that can only be accounted for, by its peculiar adaptation to the reading and genius of the times. The debates upon the subject of the exclusion must have contributed very much to enlighten the understandings of men, and to teach them to separate the objects of government from the instruments by means of which those objects are to be obtained; but it was reserved for the event of the Revolution practically to convince mankind of the happiness which a nation may reap, by resolving, at a fit crisis, to exchange the manager of the public trust, rather than frustrate the purposes for which he was invested with power. The distinguished statesmen, who contributed to renovate the Constitution of this country, at the period of the Revolution, effected no doubt an important change in the opinions of the nation, respecting the true ends of Government, in bringing back the minds of men to the liberal views and principles, which were to be learnt from a writer of the age of Henry the Sixth. And it is no disparagement of the high merit, which will always be ascribed to them by a grateful nation, if, in the present day, we are struck with a sense of impropriety, perhaps of the danger, of resting the indestructible privileges of mankind, upon the fiction, adopted by them, of an original com-

gation and command, oblige the subject to the observance of them under a greater penalty than otherwise they could do. Such are a considerable part of the Civil Laws which are digested in *great volumes* by the Roman Emperors, and by their authority commanded to be observed: whence they obtain the name of the Civil Law, in like manner as all other imperial edicts or statutes. If, therefore, under these three distinctions of the Law of Nature, Customs and Statutes, the fountains and originals of all laws, I shall prove the Law of England eminently to excel, then I shall have evinced it to be good and effectual for the government of that kingdom. Again, if I clearly make out that it is as well accommodated for the good of that State, as the Civil Laws are for that of the empire, then I shall have

pact. (Hardwick's State Papers, Vol. II., p. 401; Sacheverell's Trial, Hargr. St. Tr.; Burke's Appeal to the Old Whigs; Hume's Essays on Resistance, and the Original Compact; Bolinbroke's Dissertation on Parties; Paley's Political Philosophy; Bentham's Fragment on Government; Sir W. Temple's Essay on Government.) The manifesto of the Representatives of the United States of America, when they declared their independence of Great Britain, expresses more correctly the dictates of nature and of wisdom. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among them are life, liberty, and the pursuit of happiness: that to secure these rights, governments are instituted amongst men, deriving their just powers from the consent of the governed: that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to constitute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

made appear, that the Law of England is not only an excellent law, but that, in its kind, it is as well chosen as the Civil Law. In proof of this, I proceed.

CHAP. XVI.—*The Law of Nature in all Countries is the same.*

THE Laws of England, as far as they agree with, and are deduced from the Law of Nature, are neither better nor worse in their decisions than the laws of all other states or kingdoms in similar cases. For, as the philosopher says, in the *fifth* of his Ethics, "The Law of Nature is the same, and has the same force all the world over." Wherefore I see no occasion to enforce this point any farther; so now, the enquiry rests, what the customs and statutes of England are: and, in the first place, we will consider and look into the nature of those customs.[1]

[1] There is a fine passage in Cicero de Republicâ descriptive of the Law of Nature. "Huic legi nec abrogari fas est neque derogari ex hâc aliquid licet, neque tota abrogari potest. Nec vero aut per senatum aut per populum solvi hâc lege possumus. Neque est quærendus explanator aut interpres ejus alius nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac. Sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium Deus, ille legis hujus inventor, disceptator, lator: cui non parebit ipse se fugiet ac naturam hominis aspernatus, atque hoc ipso luet maximas pœnas etiam si cetera supplicia quæ putantur, effugint." Lib. 3, sec. 22. The subject of the Law of Nature has been treated of with great learning by the foreign Jurists, and some authors of our own country have written profoundly upon it. (Bishop Cumberland de Lege Naturæ; Tyrrel's

Chap. XVII.—*The Customs of England are of great Antiquity, received and approved by five several Nations successively.*

The realm of England was first inhabited by the Britons; afterwards it was ruled and civilized under the government

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Disquisition on the Law of Nature; Selden de jure Naturali et Gentium juxta Disciplinam Hebræorum. See also Bishop of Cloyne on Passive Obedience, First Book of Hooker's Ecclesiastical Polity.) The question whether there exist any uniform dictates of nature independent of the consideration of utility, is one which to the philosopher does not admit of a very easy solution. But every friend to the institutions of his country will watch, with vigilant care, an appeal to so vague a standard as that of natural right, in any question, which is capable of being determined by the muncipal law. Much uncertainty and perplexity arising from this source, is to be found in our legal authorities. Thus some eminent lawyers have expressed an opinion that an Act of Parliament made against natural justice, or the law of God, is void, and the reason assigned is, that "leges naturæ sunt immutabilia" and they are "leges legum." (Hobart, 87; 12 Mod. 687.) And hence questions have arisen, whether usury was against the law of God; the same of Commendams; whether a statute that no alms should be given, would militate against that law, and whether it enjoined that no excommunicated person should maintain an action: again, the Law of Nature has been thought to direct that gifts ought to become void by reason of ingratitude. (3 Inst. 151; Hob. 149; Doctor and Student, Dial. i., ch. 6, Dial. ii., ch. 45.) Perhaps Sir E. Coke may be considered to have carried this principle to a most dangerous extent, in the maxim which he so frequently repeats: "Nihil quod inconveniens est est licitum." From the same mode of reasoning is derived the distinction between "mala prohibita" and "mala in se."

of the Romans; then the Britons prevailed again; next, it was possessed by the Saxons, who changed the name of Brit-

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(Thomas *v.* Sorrel, Vaughan's Rep.; Foster's Disc., Disc. ii., ch. 1; 12 Rep. 76, Lord Macclesfield's Speech on his Impeachment; Stillingfleet on Resignation Bonds, and see Taylor's Civil Law, 129 et seq.) And partly from the same cause has arisen the great liberty which Courts of Justice have assumed, especially in ancient times, of construing Statutes by equity. Hargr. Co. Litt. 24 *b.*, n.; Hatton on Statutes; Plowden's Comm., p. 465.) Blackstone, in his Commentaries, treats of the Law of Nature as a branch of the Law of England, and as paramount to it in all cases in which they may conflict. (1 Bl. Comm. 42; Bentham on Government, 109; Doctor and Student, Dial. i., ch. 5. See also the case of Forbes *v.* Cochrane, 2 Barnewall and Cresswell's Rep.; Protest of the Lords on the occasion of the Royal Marriage Act, 12 Geo. III.) Perhaps it will be thought that such an opinion has a tendency to encourage Judges in directing their conduct by what Coke terms the crooked cord of discretion, rather than being guided by the golden metewand of the law. Examples abound in the history of this country, in which the injunctions of the Law of Nature have been pleaded as a sanction for the most flagrant violations of civil rights. It was the argument, used by Salmasius, to prove that Charles was not accountable for his arbitrary proceedings; Finch adduced the Law of Nature in support of Ship Money; and in the celebrated declaration of James II. respecting liberty of conscience, it is urged as a reason to justify the dispensing power. In some instances of very rare occurrence, as, for example, the case of the "Postnati," in which the muncipal laws are silent, it may become the duty of a Judge to enquire how foreign nations have legislated, or what individuals, eminent for their reason, have thought; and he will properly consult the natural dictates of his own understanding, corrected and matured by reflection and experience: but it appears to be a dangerous principle, on any occasion, to abandon

ain into England. After the Saxons, the Danes lorded it over us, and then the Saxons prevailed a second time; at last, the Normans came in, whose descendants retain the kingdom at this day: and during all that time, wherein those several nations and their kings prevailed, England has nevertheless been constantly governed by the same customs, as it is at present: which if they were not above all exception good, no doubt but some or other of those kings, from a principle of justice, in point of reason, or moved by inclination, would have made some alteration or quite abolished them, especially the Romans, who governed all the rest of the world in a manner by their own laws. Again, some of the aforesaid kings, who only got and kept possession of the Realm by the sword, were enabled by the same means to have destroyed the laws and introduced their own. Neither the laws of the Romans, which are cried up beyond all others for their antiquity; nor yet the laws of the Venetians, however famous in this respect, their Island being not inhabited so early as Britain; (neither was Rome itself at that time built;) nor, in short, are the laws of any other kingdom in the world so venerable for their antiquity. So that there is no pretence to say, or insinuate to the contrary, but that the laws and customs of England are not only *good*, but the *very best*.[1]

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the plain sense of the Common Law, as handed down by received tradition, or the intentions of the Legislature, as collected by an interpretation of its language, consonant as well to good sense as to grammatical accuracy, for precepts extracted from the Code of Nature, in the tables of whose law, persons will be apt to believe that they can read whatever they wish to discover.

[1] This chapter is quoted with great respect by Sir E. Coke in a Preface to his Reports, where he assents implicitly to every thing

CHAP. XVIII.—*How Statutes are made in England.*

IT only remains to be enquired whether the Statute Law of England be good or not. And, as to that, it does not

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contained in it, and supports the opinion in the text by additional authorities. But Dr. Hickes has shewn that the great oracle of the law is not entitled to much deference in questions connected with the Saxon period: and Spelman, in his Treatise upon Terms, controverts the notions of Fortescue upon this subject and treats them with ridicule. He refers to the laws of Hoel Dha, as exhibiting a model of the British customs, which appear from thence to be inconsistent with our own. Some antiquarians, however, have found the rudiments of several of our institutions among the British Laws. (See Tracts by Mr. Jones and Mr. Tate, in Hearne's Collection.) In a tract written by Mr. Hakewell, in which a passage in the text respecting the origin of our Laws is cited, and said to be destitute of proof, the introduction of the Danish Law is much insisted upon, and, in that gentleman's opinion, the Danish Law mingled with some points of the Saxon Law, and fewer of the Norman Law, constitute the Common Law now in use. On the other hand, Sir W. Temple, in the Introduction to his History, denies that any change of our Laws happened by the Danes. In the same place he makes mention of Fortescue having affirmed that our customs have been preserved through five Governments, and he observes that it is doubtful whether it can be so easily proved as affirmed, though it may be with more certainty of the three last. Selden, in his Dissertation upon Fleta, has exhibited the extent to which the influence of the Roman Law prevailed in England, from the conquest of this country by that nation to the reign of Edward III. (See also Duck's De Ortu et Progressu Juris Civilis; Dr. Pettingal on Juries; Halifax's Civil Law; Hurd's Dial. on the Constitution.) The frequent reference to the books of the Civil Law by our early writers upon legal

flow solely from the mere will of one man, as the laws do in those countries, which are governed in a despotic man-

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subjects, has been noticed in a preceding page. And in the present day these valuable records of legal wisdom are occasionally consulted, with a view to the determination of judicial questions. (Burnet's Life of Hale, p. 24; Lord Ellesmere's Case of the Postnati, Blackstone's Introduction; 3 Burr. 1670; Comyn's Rep., p. 738; Eunomus, Notes to Dial. i.) It is difficult to point out that precise portion of the Law, which existed in this country anterior to the Norman conquest. Burke refers to that event as the great æra of our Laws; but Sir W. Temple, on a considera tion of what the country lost, what it preserved, and what it gained by the Norman conquest, is of opinion that the forms of our Government and Institutions were not materially changed at that time; and this agrees with what Sir Matthew Hale has written in his History of the Common Law. We read of four different species of law which are said to have been in force in the Saxon times, but the existence of this division of the laws has been much doubted by eminent legal antiquarians; and but little light can now be obtained respecting those compilations, called the "Dombocs," which are known to have been made before the conquest. The Saxon Laws which compose the modern collections of Lambard and Wilkins have not all the same degree of credit for genuineness; and the contrast which their contents present, with those of Glanville's Treatise, shew the establishment of very different principles of law in the time of Henry the Second, from any which they contain. A discussion concerning the laws that existed in this country anterior to the conquest, has been warmly agitated in the enquiry respecting the antiquity of Juries; in the celebrated question relative to the introduction of feudal tenures into this country; and in the more important controversy regarding the origin of Parliament. Some investigations respecting other points involving a research into the changes introduced by the Normans in the Saxon Institutions, will be seen in Madox's

ner; where sometimes the nature of the Constitution so much regards the single convenience of the Legislator, whereby there accrues a great disadvantage and disparagement to the subject. Sometimes also, through the inadvertency of the Prince, his inactivity and love of ease, such

History of the Exchequer, and Hickes's Prefatory Dissertation to his Thesaurus; and much valuable information explanatory of the connection existing between the Laws of England and those of Normandy, may be gathered from Hoüard's Treatise entitled "Anciennes loix des Francois conservèes dans les coutumes Angloises." Some historical facts in the reign of William the Conqueror shew that he professed on several occasions a respect for the national institutions of the Saxons, and for the laws of Edward the Confessor: and perhaps the account given in the Dialogue of the Exchequer, respecting his proceedings in regard to the legislation of the country, will be received as being most probably authentic. "Propositis legibus Anglicanis, quasdam reprobavit, quasdam autem approbans, illis transmarinas Neustriæ leges quæ ad regni pacem tuendam efficacissimæ videbantur, adjecit." Burke has remarked, in his Introduction to English History, the evil consequences that are to be ascribed to an opinion, which he says is hardly to be eradicated from the minds of our lawyers, "that the English Law has been formed and grown up among ourselves; is quite peculiar to this Island; and has continued in much the same state from an antiquity to which they hardly allow any bounds." It is true that Sir E. Coke, in several parts of his writings, speaks of the English people as being as well in respect of their Civil Institutions as of their insular situation, "toto divisos orbe Britannos." But Bacon takes a pride in observing, "that our laws are as mixed as our language; and as our language is so much the richer on that account, so are the laws more complete." No writers have viewed more philosophically than Lord Bacon and Sir Matthew Hale, the alterations which must necessarily be made in the laws of a nation, during its progres-

laws are unadvisedly made as may better deserve to be called corruptions than laws. But the Statutes of England are produced in quite another manner: Not enacted by the sole will of the Prince, but, with the concurrent consent of the whole kingdom, by their representatives in Parliament. So that it is morally impossible but that they are and must be calculated for the good of the people: and they must needs be full of wisdom and prudence, since they are the result, not of one man's wisdom only, or an hundred, but such an assembly as the Roman Senate was of old, *more than three hundred* select persons;[1] as those

sive advancement in refinement and greatness; none have insisted with more energy on the policy of revising those forms and institutions which the varying manners of the age, the new wants of society, or a more enlightened system of jurisprudence render inexpedient.

[1] At a period, when tenure constituted the only right to a seat among the Barons, the number, whether of the greater or lesser nobility, depended upon principles, which were peculiar to the times. After the adoption of writs, but when a summons to Parliament did not confer an hereditary right, or even a right for the life of the individual to attend its meetings, the House of Peers must have experienced considerable fluctuations in the number of its members: accordingly we find, that, in the reign of Edw. I., the number of summonses generally amounted to eighty, whereas in the latter period of his successor's reign, they sometimes were under forty, and never were as many as fifty. In later times, the Peerage has not remained stationary, and we read in the history of Queen Anne, that it received an addition of twelve members in one day, who were created for the purpose of supporting the measures of a particular administration. So the numbers of the House of Commons must have greatly varied in early times, from the discretion which was formerly reposed in Sheriffs,

who are conversant in the forms and method of summoning them to Parliament, can more distinctly inform you. And, if any bills passed into a law, enacted with so much solemnity and foresight, should happen not to answer the intention of the legislators, they can immediately be amended and repealed, in the whole, or in part, that is, with the same consent and in the same manner as they were at first enacted into a law. I have thus laid before you, my Prince, every species of the Laws of England. You will of yourself easily apprehended their nature, whether they

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as to the issuing of their precepts to boroughs; from the excuses, by which particular towns exonerated themselves from the charge of appointing Representatives; from the power invested in the Crown of giving birth to the elective franchise, and which was exercised at least from the reign of Edw. IV. to that of Car. II. Historians do not appear to have attended sufficiently to the considerations which these circumstances suggest; for the character of the two assemblies, both in respect of their relative situation to each other, and their collective capacity, must have been very different, at different times; and whilst the names of Parliament, Lords and Commons, have continued the same, the ideas they have been intended to represent, have undergone a variety of transmutations. The attention of the nation was drawn to this subject, in the reign of George I., on the occasion of the Bill, which was introduced for the purpose of limiting the number of the Peerage. (Selden's Titles of Honour; Madox's Baronia Anglica; Dugdale's Summonses to Parliament; Collins's Claims; Hale's Jurisdiction of the Lords; Report of Lords' Committees respecting the Peerage; Elsynge on Parliaments; Whitelocke's Parliamentary Writ; Brady on Boroughs; Madox's Firma Burgi; Glanville's Reports; Merewether on Boroughs; Coxe's Life of Walpole, and Pamphlets respecting the Peerage Bill, there referred to; Somers's Tracts, George I.)

be good or not, by comparing them with other laws: and, when you will find none to stand in competition with them, you must acknowledge them to be, not only good laws, but such, in all respects, as you yourself could not wish them to be better.[1]

[1] The leading features of the Constitution of Parliament are described in this chapter, in a manner very much the same as that in which an author of the present day would represent them. The gradual formation and settling of that assembly, according to the sketch here given of it, is a subject of very curious and difficult enquiry. Much learning and talent has been applied, to determine the question of the participation of the Commons, in the national councils, during the Saxon and Anglo-Norman period. Sir M. Hale, who was peculiarly qualified for developing this obscure subject, confesses that he is unable to do more than guess what was the ancient right and form of Government, anterior to the time of Henry III. The nature of the political assemblies in the reign of that king, derives considerable illustration from an abundance of public records, and from the contemporary writings of two great authorities for History and Law, Matthew Paris and Bracton. After tracing the history of the branches of the Legislature to the period of their first existence in a political capacity, much learned research has been pursued, with a view of ascertaining by what authority, and according to what form of appointment, the individual members of either House have occupied their seats. An enquiry, which embraces, in the House of Lords, the distinctions between the greater and lesser Barons, Barons of the old and new feoffment, Barons by tenure, investiture, writ, patent, and by Act of Parliament, Bannerets, Peers, together with the Parliamentary rights of Bishops. And in the House of Commons, involves the consideration of the ancient Constitution of the County Courts; the early History of Towns, Leets, and Corporations; the manner in which the various classes of the community have been represented at different periods, es-

CHAP. XIX.—*The Difference between the Civil Laws and the Laws of England.*

ONE thing only remains to be explained, concerning which you have raised some scruples, that is, whether the

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pecially the tenants in ancient demesne, and the tenants of Peers; and the principle upon which Burgesses were originally summoned to Parliament. After this examination of the Constitution of the Houses of Parliament respectively, a further object of investigation has been the relative situation in which the two branches of the Legislature have stood to each other at different periods: which leads to the questions, respecting the division of the houses; the ancient manner of voting by the Knights; the right of judicature in the Lords; the Constitution of the Three Estates; and the nature of the several ancient councils of the King. It would be foreign to the purpose of this note to dwell longer upon the topics, which have been briefly adverted to; but it may not be thought irrelevant to institute a short enquiry, respecting the period at which Parliament appears by authentic records to have been settled according to the form and Constitution, which it had assumed when Fortescue describes it: especially as it was in the reign in which Fortescue wrote, that the representation of the Commons had become an object of so great national importance as to have occasioned the famous Statute, by which the election of Knights of the shire is regulated in the present day; and a seat in Parliament, as it appears, both from the public history, and the private memorials of those times, often gave rise to an animated scene of contention. By a Statute of Edward II., a declaration is made, that every legislative measure, not sanctioned by the consent of the Kings, Lords, and Commons, should be void. The Peerage Committee of the Lords observe, that this is the first solemn Act they have discovered, by which the Constitution of the legislative assembly of the Realm is dis-

Laws of England are to be looked upon so useful, so well accommodated to the particular Constitution of England,

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tinctly described, subsequently to the Charter of John, which, in their opinion, did not extend to require the common consent to all legislative measures, but only to the imposition of Scutage: it is, however, material to observe, that the Statute of Edward II. states the provisions declared in it to be according to custom. The same committee refer to the reign of Edward III., for the first declaration in Parliament, that the Knights of Shires should be elected by all the freeholders of the County, Suitors of the County Court, though no definitive law seems to have been made upon the subject until the 7th of Henry IV.: they advert to the proceedings relative to the deposing of Richard the Second, as indicating the time from which Peers were considered to be separated, in their Parliamentary capacity, from the rest of the laity; whilst the other tenants in chief of the Crown, who, according to the Charter of John, were in some measure confounded with the nobility, as also the tenants of the Peers were intermixed with the mass of the laity, and were treated as a distinct estate, represented in Parliament, by the elected Knights, Citizens, and Burgesses. Mr. Hallam has noticed a precedent in the 9th of Edward IV., as affording the earliest authority for two important points of Parliamentary Law, that the Commons possess an exclusive right to originate money-bills, and that the King ought not to take notice of what is passing in Parliament. It is from these records, that the period may be collected at which the Constitution of the Legislature of the Realm became completely settled.

It is often difficult to ascertain what has been enacted by the common consent of the Realm in ancient times. Sir E. Coke has shewn this by many examples in his 4 Inst., and it is confirmed by Prynne's Animadversions upon that work: The liberties of the subject were, at one period of our history, believed materially to depend upon the authenticity of a disputed Statute, the Statute

as the Civil Imperial Laws are for that of the Empire. I remember a saying of yours, my Prince, that *comparisons*

"de tallagio non concedendo," and, not to enumerate more instances to the same effect, at the impeachment of Lord Macclesfield, the validity of an Act of Parliament, which was not to be found in any Statute book, but was contained in the Parliament rolls, gave rise to a discussion, from its importance in sustaining the accusation against that illustrious offender. The Committee for the inspection of the public records have given a particular detail of the various sources, from which the evidence respecting the authenticity of Statutes is derived: Sir M. Hale, in his History of the Common Law, has imparted many valuable directions, for forming a correct judgment in enquiries of this nature, which depend not more upon the inspection of records than upon general and received tradition: and much valuable information upon this subject may be collected from the discussions which have arisen, respecting the form of Statutes at particular periods; upon the presumption which may be made of the assent of one or more branches of the legislature, when it is not expressed; and upon the meanings, which are to be attributed to the term "Ordinance." (Hargr. Co. Litt. 159 *b.*, n. 2, and References to Prynne, ibid.; Ruffhead's Preface to the Statutes; Elsynge on Parliaments; Whitelocke's Parliamentary Writ. Co. Litt. 29 *a.;* 2 Inst. 525. 644; 4 Inst. 25; Prince's Case, 8 Rep.; Reeves's History of the Law, Edw. III; Southampton Case, Douglas on Elections; Heywood's Vindication of Fox's History, p. 92.) It is worthy of observation, that in the reign of Henry VI., the practice became established of making up complete Statutes in the first instance, under the name of Bills, instead of the old petitions, which were frequently very much altered after they had passed the Houses: this change may be considered an important circumstance in the History of the Constitution. A royal Proclamation was at one time supposed to possess a sort of legislative efficacy; although there does not appear to be any ground for the state-

are odious; and therefore I am not very fond of making them: you will see better reasons whereby to form your

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ment of Hume, that the right of issuing proclamations, with the effect of laws, was acknowledged by lawyers, with a distinction restrictive of the authority of proclamations to the life of the Sovereign, who emitted them: and that historian's imputations against the Tudors, for their tyrannical exercise of this power, have been canvassed by Mr. Brodie, in his recent work on the British Empire. It appears from a treatise of Hale's, that proclamations were frequently issued with penalties, merely in terrorem. (Hale's De Portibus Maris, Pars. Sec., ch. 9.) In the reign of Charles I., severe fines were levied upon individuals, for disobedience to proclamations which were grounded upon the most capricious and fanciful causes. (See some remarkable instances of this, in D'Israeli's Curiosities of Literature, from a Manuscript of D'Ewes; Stratford's Lett. and Disp. 2, p. 142; 2 Rush., pp. 28, 144, 289.) Clarendon relates, that under the government of that King, the same individuals in the capacity of Privy Counsellors sent forth proclamations, and afterwards in the character of members of the Star Chamber, in another room, punished the infraction of them. It is to the honor of Sir E. Coke, that he asserted an opinion, notwithstanding the opposition he experienced, on that occasion, from the disgraceful demeanour of the Lord Chancellor, and Lord Privy Seal, that the King could not change any part of the Common Law, or create any offence by his proclamation, and that there never was an indictment, which concluded "contra Regiam proclamationem." It is upon the authority of Fortescue, that his argument was principally founded, and he further mentions, that it was resolved in the same term, at a conference held between the Judges and the Privy Council, that the King's Proclamation is neither Statute Law, Common Law, or Custom, the three parts of the Law of England; that no offence could be created by it; and that the King has no prerogative, but that which the Law of the Land allows him. (12 Rep., Case of

judgment, and which of the two laws may deserve the preference, by considering wherein they differ, than by

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Proclamations, 3 Lodge's Illustrations, 364.) It is not suprising, therefore, that an attempt in modern times to justify upon constitutional principles, an embargo laid on the ports, in time of peace, under the colour of a Royal Proclamation, should have been animadverted upon, with indignant eloquence in Parliament, or that the Legislature should have pronounced it contrary to law. (Parl. Hist. A. D. 1766; Hargr. Pref. to Hale's De Jure Maris.) A legislative power has sometimes been assumed, not only by the Sovereign, but also by the Houses of Parliament. A multitude of Treatises have been written upon the legality of the ordinance for the Militia, which was enacted during the great rebellion: Whitelocke details a celebrated debate upon the subject in his memorials, and at the treaty of Uxbridge, he challenged Lord Clarendon to a personal argument on the question. A House of Commons in the reign of Charles II. promulgated their opinion, that a particular branch of the laws ought not to be put in execution: upon which proceeding Burnet observes, that it was thought to be a great invasion of the Legislature, and was to act like dictators in the State. Our judicial history exhibits several memorable instances, wherein an attempt by the House of Lords, to arrogate a power with which the Constitution did not invest them, has met with a resolute and successful resistance. (Case of Skinner and the East India Company; Case of Charles Knollis, Esq., claiming to be Earl of Banbury; Case of Bridgman and Holt. See Hargrave's Preface to Hale's Jurisdiction of the Lords.) And Lord Holt has left an example by his conduct, in the case of Ashby and White, of a similar unbending spirit toward the encroachments of the Commons. The manner in which a Court of Law ought to treat every assumption by one of the branches of the legislature of those powers, which appertain to them only when they are united, was properly expressed by Lord Mansfield, in the debate upon the address, A. D. 1770. He is reported to have said,

taking my opinion in the matter upon trust. Where they agree, they are equally praiseworthy; but in cases where they differ, that law which is the most excellent in its kind, after mature consideration, will eminently appear so to be: wherefore I shall produce some such cases, that you may weigh them in an equal balance, and thereby know for certain which law is the more just and rational in its decisions: and first, I shall propose some instances of cases which appear to me the most considerable.

Chap XX.—*The first Case wherein the Civil Laws and the Laws of England differ.*

Where any have a controversy depending before a Judge, and they come to a trial upon the matter of fact, which those who are skilled in the laws of England, term the *Issue of the Plea* in question, the issue of such plea, by the rules of the Civil Law, is to be proved by the depositions of witnesses, and two witnesses are held sufficient: but, by the Laws of England, the truth of the matter can not appear to the Judge, but upon the oath of twelve men of the neighborhood where the fact is supposed to be done. Now, the question is, which of those two ways of proceeding, so different, is to be esteemed the more rational and effectual for the discovery of the truth. That law which

that declarations of law, made by either House of Parliament, were always attended with bad effects, that he constantly opposed them when he had an opportunity, and never, in his judicial capacity, thought himself bound to honor them with the slightest regard. (See also the Debates in the Lords and Commons, on the Power of the Commons to Suspend the Execution of Law, A. D. 1784.)

takes the best and most certain way of finding out the truth, is in that respect preferable to the other, which is of less force and efficacy: in the examination hereof, I proceed thus.[1]

[1] In this chapter Fortescue represents the institution of the Jury as being the prevailing form of trial in England: and many contemporary authorities, particularly the familiar letters of the Paston family, bear testimony to the same fact. It may be useful and interesting to ascertain the extent to which the trial by Jury was adopted in the time of Fortescue, which involves an enquiry into the history of its introduction, and of its gradual substitution for other modes of judicial investigation.

Dr. Pettingall, who reasons upon the ground, that legal and political institutions are the productions of civilized nations, and the result of wisdom and cultivated nature, has sought for the origin of this beneficial and liberal form of trial in the regulations of Grecian and Roman judicature; and he has endeavoured to establish, that what was at first a Roman law, and a mark of servitude in this country, by long usage came to be forgotten as such, and to be considered only as an ancient prescription. (Pettingall on the Use of Juries among the Greeks and Romans.) Sir W. Jones, in the Preface to his translations of Isæus, agrees with Dr. Pettingall, that the Athenian Juries differed from ours in very few particulars. A learned controversy has been sustained upon the question, whether the trial by Jury was in use among the Saxons. (Spelman's Gloss, Voc. Jurata; Hickes's Dissertatory Epistle on Saxon Literature; Preface to Wilkins's Leges Anglo-Saxonica; Brady's History of England; Hallam's Middle Ages, ch. 8; Reeves's History of the English Law, Part I., c. 1.) The discussions have principally turned upon the circumstance, that in examining the laws and the treatises of the Saxons, together with the history of their judicial proceedings, the expressions which some writers suppose have reference to a Jury, are by

Chap. XXI.—*The Inconvenience of that Law which tries Causes by Witnesses only.*

By the course of Civil Law, the party, who, upon the

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others construed to be intended of compurgators, of the suitors of Court, or of certain assessors to the Judges. The first satisfactory relation of a trial by Jury in England, is in a cause in which Gundulph, Bishop of Rochester, was a party, and which was tried before the Bishop of Baieux, in the reign of the Conqueror. It was not until the reign of Henry the Second, that the trial by twelve men, "duodecemvirale judicium," generally superseded the trial by an indefinite number of suitors of Court, which was in very common use during the Saxon times. Reeves's History of the Law, Henry II.; Hallam's Middle Ages, ch. 8; Hickes's Diss. Epist.) The celebrated expression in Magna Charta, "judicium parium," has received different interpretations, besides the more common one of its referring to a Jury. In the opinion of some writers, it means a trial by the pares curiæ; and Coke observes that "judicium" is used instead of "veredictum," because it is intended to relate to proceedings before Lords in Parliament. (2 Inst. 49.) The trial by Duel had been a very ancient custom among the Normans, but it became gradually neglected after the Institution of Henry the Second, mentioned by Glanville, which abolished it in some cases, and afforded the option of avoiding it in others: to obviate the necessity of having recourse to this species of trial, in cases not within the scope of the provision of Henry II., the grand assize were frequently charged with the determination of collateral questions, which was signified by the expression "assisa vertitur in juratam:" and the Courts began to encumber the right of battle with new restrictions, as the eminent advantages of the trial by Jury became more fully apparent. We meet, however, with a judical duel in the 19th of Henry VI., and other instances have occurred since Fortescue wrote. In judging, however, of the sentiments of the age,

trial, holds the affirmative side of the question, is to produce his witnesses, whom he is at liberty to name at his pleas-

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from proceedings of this nature, the qualifications of a champion are not to be lost sight of, he must have been "idoneus testis" and "liber homo." (Glanville, lib. ii., c. 6 and 7; Several Tracts on Judicial Combats; Hearne's Curious Discourses; Selden's De Duello; 2 Inst. 247; 3 Inst. 157, 159, 221; Reeves's History of the Law, Henry II., Henry III., Edw. III., Henry VI. Among the Cottonian Manuscripts, is a mass of Materials respecting the Law of Duels, a great portion in the handwriting of the Earl of Northampton, who was in the Commission for executing the Office of Earl Marshal.) The trial by ordeal was very prevalent during the Saxon period. The forms of it are particularly described by Selden in his "Janus Anglorum." Only one species of it occurs in the survey of Domesday. It had gone out of use before the time of Bracton, who makes no mention of it in his book. Its abolition is thought to be properly referred to the beginning of the reign of Henry III. There is a writ of that King preserved in Rymer, (Vol. 1, p. 228,) directing the Judges itinerant to suspend all trials by fire and water till further provision could be made; which is generally supposed to have put an end to the custom: it had previously been prohibited by the Church. The trial by compurgators occurs in the Saxon times, and is described by Glanville. In the opinion of Selden it was the "legem terræ," mentioned in Magna Charta. Traces of this form of trial still remain in some of our inferior Courts of Law of ancient origin: it is the process which exists of common right, in the County Court and Court Baron. (Hickes's Diss. Epist.; Glanville, lib. i., c. 9; 2 Inst. 45, 143.) And the privilege of it has been claimed in modern times in the Courts of Westminster. (1 N. R. 297; 2 B. and C. 538.) The prevalence of the trial by compurgators was greatly diminished when it became settled, that wager of law was not allowable in Exchequer process: there is a determination to this effect in the reign of Henry V.,

ure.[1] On the other hand, a negative is incapable of being proved; I mean directly, though indirectly it is otherwise.

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but the question long remained open to discussion. The actions upon the case given by the Statute of Westminster, were, in the time of Fortescue, gradually supplanting the trial by wager of law, in becoming a substitute for those forms of action in which law-wager was permitted. These actions upon the case had been greatly expanded in the reign of Henry VI. Assumpsit had been brought so early as in that of Henry IV. Yet it was not until this last species of action had become a remedy applicable to all cases of debt, on simple contract; till the action of trover was generally adopted instead of detinue, and Chancery proceedings were resorted to in preference to the action of account, that the trial by Jury can be said to have completely superseded that of wager of law. (Reeves's History of the Law, Henry IV., Henry V., Henry VI.) There are some instances of a very singular and mixed species of trial; a trial before the Lords in which there was a verdict of a Jury. Such were the cases of Sir T. Berkeley, in the reign of Edward the Third, and of Alice Piers in that of Richard II. (Report of the Lords' Committees respecting the Peerage, p. 267; Reeves's History, Edw. III., Rich. II.) And an enumeration of some other modes of trial of inferior importance is to be found in the Report of the Case of the Abbot of Strata Marcella. (9 Rep., and see respecting the Number of Jurors in particular Cases, Hargr. Co. Litt. 155 *a.*, n. 3, 159 *a.*, n. 2.)

[1] Hale, in his History of the Common Law, observes, that it is one of the excellencies of a Jury over the trial by witnesses, that although the Jurors ought to give great regard to the testimony of witnesses, yet they are not always bound by it. But some trials by our law have witnesses without a Jury: as of the life and death of the husband in Dower, and in "cui in vitâ," so in Englesherie anciently, and in "nativo habendo." The mention of the trial "per proves" in contradistinction to the trial "per

Now, he may well be thought a person of an inconsiderable interest, and of less application, who, from the gross of mankind and all his acquaintance, can not find out two, so devoid of conscience and all faith, who, through fear, inclination, affection, or for a bribe, will not be ready to gainsay the truth. So that the party, to make good his cause, is at his liberty to produce two of such a stamp; and if the other party had ever so much mind to object against them, or their evidence, it will not always happen that they are or can be known by the party, defendant in the cause, in order to call in question their life and conversation, that, as persons of a profligate character, they might be cross-examined; upon which account their evidence might be set aside: and, seeing their evidence is in the *affirmative*, it is not so capable of being overthrown by circumstances, or any other indirect proofs. Who then can live securely with respect to his life, or estate, under such a law which is so much in favour of any *one*, *who* has a mind to do mischief? And what two wicked wretches have usually so little caution, as not to form to themselves beforehand a perfect story of the fact, about which they know they are to be examined, with every minute circumstance attending

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pais" often occurs in Glanville, Bracton and the year books. A practice appears to have been introduced, in consequence of a clause in Magna Charta, (c. 28,) to examine the secta or suit of the plaintiff, and in several ancient records, the result of the examination is given, and sometimes the default of the plaintiff in not producing his secta is mentioned: this proceeding appears to have become a mere formality in the time of Edw. III. (2 Inst. 44, 80, 662; Dyer, 185 *a.*; Selden ad Fortescue; Bracton, lib. iv.; Tract. 6, cap. 7; Fleta, 137; Year Book, 17 Edw. III., fol 48 *b.*; Reeves's History of the Law, Henry III., Edw. III.)

it, as if they had been true and real? "For, the children of this world (as our Saviour says) are in their generation wiser than the children of light." So, wicked Jezebel produced in judgment two witnesses, sons of Belial, to impeach Naboth, whereby he lost his life, and Ahab took possession of his vineyard. (1 Kings xxi. 11, 17.) Again, by the testimony of *two elders*, who were judges, Susanna, the virtuous wife of Joacim, had been put to death as an adulteress, had not God himself miraculously interposed to rescue her by a method so sudden and inconceivable, as carried the plain marks of inspired wisdom, and such as was far above the natural attainments of a *youth*, not yet arrived to maturity of years or judgment. For, though by varying in their evidence, he plainly convicted them to be false witnesses; yet, who but God alone, could have foreseen that they would thus have varied in their evidence? Since there was no law which obliged them to be so exact in every little circumstance, as to remember under what kind of tree the fact alleged was committed. For, the witnesses of any criminal action are not supposed to take notice of every bush, or other circumstance of place, which seemed to import nothing, either as to the detecting or aggravating of the crime. But, when those wicked judges, in such their wilful deposition, varied concerning the species of the tree, their own words demonstrated that they had prevaricated and deviated from the truth, whereby they deservedly incurred the sentence of the law of Moses, according to which, they did unto them in such sort as they maliciously intended to do to their neighbor: and they put them to death.

You have, most gracious Prince! within your own memory, a remarkable instance, how much justice may be per-

verted, in the case of Mr. John Fringe: who, after he had been in priests' orders for three years, was, by his own procurement, and the deposition of two false witnesses, (who swore that he had been formerly contracted to a certain young girl,) compelled to quit his orders and to marry her: after cohabiting with her fourteen years, and having had by her seven children, being at last convicted of high treason against your highness, in the very article of death, and in the hearing of a multitude of people, he declared that those witnesses had been suborned by him, and that what they deposed was utterly false and groundless. Many like instances you may have heard of, where justice has been perverted by means of false witnesses; even under judges of the greatest integrity, as is notorious to those, who converse with and know mankind. This sort of wickedness, alas! is but too frequently committed.

CHAP. XXII.—*Concerning Torture and putting to the Rack.*

FOR this reason, the Laws of France, in capital cases, do not think it enough to convict the accused by evidence, lest the innocent should thereby be condemned; but they choose rather to put the accused themselves to *the Rack*, till they confess their guilt, than rely entirely on the deposition of witnesses, who, very often, from unreasonable prejudice and passion; sometimes, at the instigation of wicked men, are suborned and so become guilty of perjury. By which over cautious, and inhuman stretch of policy, the suspected, as well as the *really* guilty, are, in that kingdom, tortured so many ways, as is too tedious and bad for description. Some are extended on the *rack*, till their very sinews crack, and the veins gush out in streams

of blood: others have weights hung to their feet, till their limbs are almost torn asunder, and the whole body dislocated: some have their mouths *gagged* to such a wideness, for a long time, whereat such quantities of water are poured in, that their bellies swell to a prodigious degree, and then being pierced with a faucet, spigot, or other instrument for the purpose, the water spouts out in great abundance, like a whale (if one may use the comparison) which, together with his prey, having taken in vast quantities of sea-water, returns it up again in spouts, to a very great height. To describe the inhumanity of such exquisite tortures affects me with too real a concern, and the varieties of them are not to be recounted in a large volume. The Civil Laws themselves, where there is a want of evidence in *criminal* cases, have recourse to the like methods of torture for sifting out the truth. Most other kingdoms do the same: now, what man is there so stout or resolute, who has once gone through this horrid trial by torture, be he never so innocent, who will not rather confess himself guilty of all kinds of wickedness, than undergo the like tortures a second time? Who would not rather die once, since death would put an end to all his fears, than to be killed so many times, and suffer so many hellish tortures, more terrible than death itself? Do you not remember, my Prince, a criminal, who, when upon the rack, impeached (of treason) a certain noble knight, a man of worth and loyalty, and declared that they were both concerned together in the same conspiracy; and being taken down from the rack, he still persisted in the accusation, lest he should again be put to he question. Nevertheless, being so much hurt and reduced by the severity of the punishment, that he was brought almost to the point of death, after he had the *Vi-*

aticum and Sacraments administered to him, he then confessed, and took a very solemn oath upon it, by the body of Christ; and as he was now, as he imagined, just going to expire, he affirmed that the said worthy knight was innocent and clear of every thing he had laid to his charge: he added, that the *tortures* he was put to were so intolerable, that, rather than suffer them over again, he would accuse the same person of the same crimes;[1] nay, his own father: though, when he said this, he was in the bitterness of death, when all hopes of recovery were over. Neither did he at last escape that ignominious death, for he was hanged; and, at the time and place of his execution, he acquitted the said knight of the crimes wherewith he had, not long before, charged him. Such confessions as these, alas! a great many others of those poor wretches make, not led by a regard to truth, but compelled to it, by the exquisiteness of their torments: now, what certainty can there arise from such extorted confessions; but, suppose a person falsely accused should have so much courage, so much sense of a life after this, as, amidst the terrors of this fiery trial, (like the three young Jews of old, Dan. iii.) neither to dishonour God, nor lie to the damnation of his soul, so that the judge should hereupon pronounce him innocent: does he not with the same breath pronounce himself guilty of all that cruel punishment, which he inflicted upon such person *undeservedly?* And how *inhuman* must *that law* be, which does its utmost to condemn the innocent, and convict the judge of cruelty? A practice so inhuman deserves not indeed to be called a law, but the high road to hell. O

[1] The reader will be struck with the similarity between this relation and the language of Felton, when he was threatened with the rack. (Whitelocke's Memorials, p. 11.)

judge! in what school of humanity did you learn this custom of being present and assisting, while the accused wretch is upon the rack. The execution of the sentence of the law upon criminals is a task fit only for *little villains* to perform, picked out from amongst the refuse of mankind, who are thereby rendered infamous for ever after, and unfit to act, or appear, in any Court of Justice. God Almighty does not execute his judgments on the damned by the ministration of *angels*, but of *devils;* in *purgatory*, they are not *good spirits*, which torment and exercise souls, though predestinated to glory, but *evil spirits*. In this world, the wicked, by the permission of God, inflict the evil of punishment on sinners. For, when God said (1 Kings xxii. 20), "Who shall persuade Ahab that he may go up and fall at Ramoth Gilead," it was an *evil spirit* which came forth and said, "I will be a lying spirit in the mouth of all his prophets:" though God, for just reasons, had determined to suffer Ahab to be persuaded, and deceived by a lie, yet was it by no means becoming a *good spirit* to be employed on such an errand. Perhaps, the judge will say, I have done nothing of myself in inflicting these *tortures*, which are not by way of punishment, but *trial;* but, how does it differ, whether he does it himself, while he is present on the bench, and, with reiterated commands, aggravates the nature of the crime, and encourages the officer in the execution of his office. It is only the master of the ship who brings her into port, though, in pursuance of his orders, others ply the steerage: for my own part, I see not how it is possible for the wound, which such a judge must give his own conscience, ever to close up, or be healed; as long, at least, as his memory serves him to reflect upon

the bitter tortures so unjustly and inhumanly inflicted on the innocent.[1]

[1] The passages in the text will be read with interest, as exhibiting a very early protest on the behalf of injured humanity against the Law of Torture. It must, however, be observed, that the imperial Code, however deserving of reprobation, for countenancing the application of torture under any circumstances, contained many restrictions on the use of it; in particular, to constitute a sufficient cause for condemnation to the rack, there must have been one witness against the prisoner, accompanied with pregnant presumption of guilt, or an extrajudicial confession proved by two witnesses. On the other hand, the annals of our own country have been deeply stained by the adoption of this inhuman practice. (See a Collection of Instances, in which Torture has been used in England, from the early mention of it, in the Proceedings against the Templars, tem. Edw. II., till the Declaration of the Judges on the Occasion of Felton's Trial, Barrington's Observations on West. I. and 27 Hen. VIII.; Rose's Observations on Fox's History, and Heywood's Vindication of that Work; Grey's Hudibras, Part II., Canto ii., l. 335; Ellis's Original Letters, Vol. II., p. 261; Brodie on the British Empire, Vol. I., p. 236, Vol. II., p. 207–209; Retrospective Review, No. xviii.; from the Manuscript of Sir S. Romilly, Observations on the late Continuance of Torture in Great Britain, Archæol. Antiq. Soc., Vol. X. For a Defence of the use of Torture, see "the Law of Laws," by Sir R. Wiseman, published A. D. 1664; for a description of the Rack, see Strait's Antiq., Vol. III., p. 46.) In perusing the horrible catalogue of examples of the use of torture in Great Britain, one is shocked to find, subscribed to warrants directing its infliction, the name of individuals, conspicuous for singular zeal either in the prosecution of philosophical truth, or the vindication of political liberty. This disgrace is attached to the characters of Lord Bacon, Sir E. Coke, and William the Third. (Vol. X., Archæol. Antiq. Soc.; Rose, p. 179; 1 Scott's Somers's

Chap. XXIII.—*The Civil Law defective in doing Justice.*

Further, if a right accrues to a man to plead upon a trial, which arises from a *contract*, a *fact* done, a *title of*

Tracts, 211.) The last of these eminent persons was indeed a foreigner, and did not infringe the law of the country in which he commanded torture to be applied, for until the time of the Union, it was permitted by the Law of Scotland. (Sir G. Mackenzie's Criminal Law, p. 543; Stair's Institutes, 699.) And Sir E. Coke has left to posterity, in his Institutes, an indignant censure of the practice; which he affirms to be repugnant to the letter and spirit of Magna Charta, and to be unsupported by any one legal authority or judicial record. It is observable, that in this part of his works, he pays a just tribute of praise to the opinion of Fortescue, which he adopts as the foundation of his own. It may not be too much to say, that the sentiments which are expressed in this chapter, are not only honorable to the writer of them, but have had a practical and highly beneficial influence on the jurisprudence of the country. Montesquieu has descanted upon the example of England, as being a nation, among whom torture had been abolished, and no inconvenience had resulted from the want of it: Sir Thomas Smith, in his Republic, written in the reign of Edward the Sixth, takes pains to prove that torture is repugnant to the character of the people in this country. The adoption of it on the continent is, in a great measure, owing to the sanction given to it in a code of laws composed by Charles V., called the Carolina. It was abolished by the Code Napoleon: but there exists in France a species of mental torture, called Le Secret, which has been depictured by the writers of that nation in the most frightful colours. (Observations sur Plusieurs points importans de notre Législation Criminelle par M. Dupin; De la Justice Criminelle en France par M. Beranger.) It will always be recol-

inheritance, or the like: in these cases, if either there were no witnesses at the first; or, if they that were, are dead, the *plaintiff* will be obliged to drop his action, unless he can prove his right by such strong circumstantial proofs, as are not to be evaded, which seldom happens. Where lordships, and other possessions are in dispute; and in all other actions which fall under the jurisdiction of the Civil Law, the actions of the *plaintiffs* are very often rendered

lected, that many foreign writers, whose views have soared above the confined principles of the Governments under which they lived, have followed in the same wise and liberal track, in which they were preceded by Fortescue. Among these the name of Beccaria, connected with every thing that is humane in the administration of justice, stands conspicuous. The observations of Montesquieu on the subject are remarkable: "Tant d'habiles gens et de beaux genies ont écrit contre cette pratique que se n'ose parler après eux. J'allois dire qu'elle pourroit convenir dans les gouvernements despotiques ou tout ce qui inspire la crainte entre plus dans les ressorts du gouvernement; J'allois dire que les esclaves chez les Grecs et chez les Romains—mais j'entends la voix de la nature qui crie contre moi." Voltaire has expressed his sentiments upon this practice in a strain of eloquence dictated by the most enlightened philosophy, and the tenderest feelings of the heart: "Ici un spectacle effrayant se presente tout-á-coup a mes yeux, le juge se lasse d'interroger par la parole, il veut interroger par les supplices: impatient dans ses recherches et peut-être irritè de leur inutilité, on apporte des torches, des leviers, et tous ces instrumens invéntés pour la doleur. Un bourreau vient se mêler aux fonctions de la Magistrature, et terminer par la violence un interrogataire commencé par la liberté—Douce philosophie, toi qui ne cherche la verité qu'avec l'attention et la patience, t'attendais-tu que dans ton siècle on employât de tels instrumens pour la decouvrir." (L'Homme aux quarante ecus.)

incapable of being brought to an issue for want of evidence, so that scarce one half of them can attain the end proposed: under what denomination then is that law to be ranged, which, where parties are injured, is so defective in making satisfaction. I question whether such a law can be called just, if that be true which this very law informs us, (viz.) "That justice gives to every one their due;" which such a law as this most certainly does not.[1]

Chap. XXIV.—*The Division of Counties; Sheriffs, and their Appointment.*

It being thus explained how the Civil Laws direct the judge concerning the truth of a fact, which is brought on

[1] The preamble to the 27th Henry VIII. enumerates the inconveniences experienced in trials in the Admiralty Court, conducted according to the rules of the Civil Law, and may illustrate the observations of Fortescue, in the present and some preceding chapters. "Where pirates upon the sea many times escaped unpunished, because the trial of their offences hath heretofore been ordered before the Admiral after the course of the Civil Laws, the nature whereof is, that before any judgment of death can be given against the offenders, either they must plainly confess their offence (which they will never do without torture or pains) or else their offences be so plainly and directly proved by witnesses *indifferent*, such as saw their offences committed, which can not be gotten but by chance at few times, because such offenders commit their offences upon the sea, and at many times murder and kill such persons being in the ship or boat where they commit their offences, which should bear witness against them in that behalf, and also such as bear witness be commonly mariners and shipmen, which, for the most part, can not be gotten, nor had always ready to testify such offences without long protraction of time, and great costs and charges, etc."

to trial, it remains to be explained how the Laws of England boult out the truth of a fact, when it comes in issue. The manner of proceeding in both laws being laid, and compared together, their qualities will appear the more eminently, according to that saying of the *philosopher*, "Opposites placed together give light to one another." But here, by way of introduction, and to borrow the rule or method used by orators, it may be necessary to premise some things, a right understanding whereof will help to let us into a more clear and distinct understanding of what follows: I proceed thus: England is divided into Counties, as France is into Bailliwicks, or Provinces, so that there is no place in England, which is not within the body of some County:[1] Counties are divided into Hundreds, which in some parts of England are called Wapentakes,[2] and Hundreds again are

[1] Among Hearne's Discourses are several curious Tracts relative to the antiquity of Counties, and the principle upon which the division of them was made; and several solutions are there offered, to account for those strips of counties lying within the limits of one Shire, but which are parcel of another: the division of Counties is also treated of by Camden, in the Introduction to his Britannia, and many interesting facts respecting the Counties of England, are collected in the Dissertation upon Domesday Book, which has been published by commissioners for the public Records. (See further, respecting the "quillets" of Counties, Peck's Notes on Shakespeare's Plays, in his Memoirs of Milton, p. 230, and on the antiquated Counties, the distinction of Counties and Shires, and the Earldom of Berkshire, Fuller's Worthies, c. 19.)

[2] In the laws ascribed to Edward the Confessor, is the following passage: "Everwickshire, Nicholshyre, Nottinghamshire, Leicestershire, Northamptonshire usque ad Watlingstrete et octo millia ultra sub lege Anglorum sunt, et quod Angli vocant hundredum

subdivided into Vills,[1] under which appellation Cities and

supradicti comitatus vocant wapentachium." It appears from an entry in Domesday Book, under the head of Nottinghamshire, that the Wapentake paid the third penny in the same manner as the Hundred. The original meaning signified by the division of hundreds has been disputed by antiquarians of great celebrity: a hundred families, a hundred proprietors, a hundred hydes, a hundred villages, have all been assigned as the foundation of the name. Tacitus speaks of an institution among the ancient Germans, which is supposed by some writers to have been introduced by the Saxons into this Country, "Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur." And another passage from the same author has been thought to explain the meaning of the term Wapentake, "Considunt armati: si displicuit sententia, fremitu aspernantur: sin placuit, frameas concutiunt." But the signification of this word, as well as that of "Hundred," has given rise to a variety of opinions. Hallam conjectures that the Wapentakes must have been planned upon a different system from the Hundreds, for he thinks that the circumstance of the greater density of population existing in the south of England in early times, is not sufficient to account for the inequality observable in the number of Hundreds for the same extent of Country. The Wapentakes appear to have undergone a great alteration in their names since the period when Domesday Book was compiled. (Diss. on Domesday Book, Report of the Commissioners for Public Records; Hallam's Middle Ages, Vol. II., p. 139, and see ibid., respecting the Jurisdiction of the Tithing-man; Spelman's Gloss. Voc. Wapentachium and Hundredus; 2 Inst. 99.)

[1] Fortescue's description of Vills is cited in the first Institute: but Coke's definition is more particular than that in the text: he says that a Vill is "ex pluribus mansionibus vicinata," and it must have had a church and celebration of divine service, sacraments and burials. Blackstone observes, that the latter distinction is more of an ecclesiastical nature, and he adds, that a Vill

Boroughs[1] are included. The boundaries of those Vills are not ascertained by walls, buildings or streets; but, by a compass of fields, large districts of land, some *hamlets*,[2]

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formerly contained ten freeholders, and is synonymous with a tithing. It has been considered that the word "pluribus" in Coke's definition, points to a greater number than two: but the modern notion of a Vill in the Courts of Law, seems to depend upon the circumstance of the place having had a constable. In the Exchequer is preserved a register of the names of all the villages and towns of England, collected in the reign of Edward II., and a similar catalogue entitled Villare Anglicum, is published among Spelman's Works. (Diss. on D. B. Co. Litt. 115 *b.*; Spelman's Gloss *v.* Villa; Tract upon Towns by Sir R. Cotton in Hearne's Discourses; R. *v.* Showler, 3 Burr. Rep.; R. *v.* Horton, 1 T R., and for the early Progress of Towns in England, Hallam's Middle Ages, Vol. II., p. 224 et seq.; Brodie's British Empire, Introduction.)

[1] A variety of curious particulars respecting the Cities and Boroughs existing at the time of the conquest, are contained in Domesday Book, and are collected in the dissertation upon that work, recently published by the commissioners of public records. The account which is given of Cities and Boroughs by Coke in his Institutes, and in which he is generally followed by Blackstone, appears liable to many well founded objections. (Hargr. Co. Litt. 108 *b.*, n. 3 and 4; 109 *b.*, n. 2 and 3; Brady on Boroughs; Madox's Firma Burgi; Whitelocke on the Parliamentary Writ; Essay on the Antiquity of Cities in Hearne's Cur. Disc.)

[2] Spelman in his Glossary (Voc. Hamel), after mentioning the signification of "ham" to be "villa" and that of "let" "membrum," cites the following passage from a Statute of Edw. I. which explains the division of the Country into Hamlets: "Que ils ordeinent et facent venir devant eux de chescune ville entier 8 homes, et de demie ville 6 homes, et de hamlette 4 homes des

and divers other limits; as rivers, water-courses, woodlands, and wastes of common, which there is now no occasion to describe by their particular names; because there is scarce any place in England, but what is within the limits of some Vill, though there be certain privileged places within Vills, which are not reputed as parts or parcels of such Vills; farther, there is in every county a certain officer, called the King's Sheriff, who, amongst other duties of his office, executes within his county all mandates and judgments of the King's Courts of Justice: he is an annual officer; and it is not lawful for him, after the expiration of his year, to continue to act in his said office, neither shall he be taken in again to execute the said office within two years thence next ensuing. The manner of his election is thus: Every year, on the morrow of All-Souls, there meet in the King's Court of Exchequer all the Kings Counsellors, as well Lords spiritual and temporal, as all other the King's Justices, all the Barons of the Exchequer, the Master of the Rolls, and certain other officers, when all of them, by common consent, nominate three of every county, Knights or Esquires, persons of distinction, and such as they esteem fittest qualified to bear the office of Sheriff of that county, for the year ensuing: the king only makes choice of one out of the three so nominated and returned. Who, in virtue of the King's Letters Patent, is constituted High Sheriff of that county, for which he is so chosen, for the year than next ensuing. But, before he can take upon him to act in consequence of the said Letters Patent, he shall swear upon the holy Evangelists, amongst other clauses, well, faithfully and indifferently to execute

pluis sages et pluis loyalz." Spelman defines a Hamlet to be a place, "Ubi quinque capitales plegii non deprehensi sunt."

and do his duty for that year, and that he will not receive any thing, under pretext or color of his said office, from any one, other than and except from the King's Majesty.[1] This being premised, let us now proceed to those other matters which fall in with our present enquiry.[2]

[1] This is provided for by the Statute of West. 2, c. 26, which Coke observes was made in affirmance of a fundamental maxim of the Common Law. (2 Inst. 210. See concerning the Sheriff's Ox. West. 2, c. 25.)

[2] Selden, in his "Titles of Honour," assigns a different meaning to the terms Comes and Vicecomes, from those which usually occur in the glossarists, and which are authorized by the "Dialogue of the Exchequer." Selden derives Comes, not from the Earl participating in the profits of the County, (a derivation which he acknowledges to be recognized in many ancient patents conferring the title,) but from his being the companion and Counsellor of the Prince; which agrees with Bracton's view of the subject. So he conceives the term Vicecomes did not denote any subordination to the Comes, but meant that the King had appointed a person who might "supplere vicem Comitis" in those Counties where he had no Comes. (Selden's Titles of Honour, Part II.; Madox's Notes on the Dialogue of the Exchequer, p. 31.) The nature of the Sheriff's duties, in the early period of our history, is minutely detailed in Madox's Treatise upon the Exchequer. A Sheriff in former times had often more Counties than one under his charge, in the same manner as the Sheriff of Cambridge is, at the present day, also Sheriff of Huntingdon. Upon this circumstance was founded the argument in the case of Wilkes's outlawry, that an averment of the proceedings in outlawry having taken place at a Court holden by the Sheriff of Middlesex within the County of Middlesex, was compatible with the possible fact, that the Sheriff of Middlesex might also be the Sheriff of some other County, and might have been holding the County Court, for that County, within Middlesex, which the law allowed,

Chap. XXV.—*Jurors; how chosen and sworn.*

Whensoever the parties contending in the King's Courts are come to the issue of the Plea, upon the matter of fact,

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and that consequently the proceedings might not have taken place at a County Court for Middlesex: but as two persons never were Sheriff of any other County than Middlesex, the argument was not maintainable. The question does not appear free from doubt, whether before the Statutes, which relate to the office of Sheriff, it was in the appointment of the freeholders of the County or of the Crown. (2 Inst. 558; Madox's Notes on the Dialogue of the Exchequer, p. 33; Spelman's Gloss. Voc. Vicecomes.) Anciently the situation of the Sheriff must have been one of the highest responsibility; the collection of the royal revenue for the County usually appertained to that officer. (Madox's Exchequer, p. 223; Barrington's Observations on Art. Super Chartus, and Stat. de Marlb.) His interference was required on the occasion of distresses of various kinds, which appear to have been very numerous at an early period. (Barrington's Observations on Magna Charta, c. 14, and Stat. de Scacc., 51 Hen. III.) And at a time when the forcible abduction or detention of wards was of frequent occurrence, and individuals had often recourse to violent methods for the assertion of their real or supposed rights the authority and summary powers of the Sheriff were often called into use. (Paston Letters, Vol. III., Lett. 22, and many others in the same Collection.) But the most important occasions upon which the Sheriff is invested with an authority, materially affecting the interests of the community, is, in the discharge of his duties as the returning officer at elections for Members of Parliament, and in the appointment of proper persons to perform the office of Jurymen. The partiality of Sheriffs in executing Writs of Parliament, became the subject of complaint at a very early period. (Stat. 5 Rich. II., Part II., c. 4; 7 Henry IV., c. 15; 1 Henry V., c. 1; 8 Henry VI., c. 7; 23 Henry VI., c. 14; Henry's History, Book

the justices forthwith, by virtue of the King's Writ, write to the Sheriff of the County, where the fact is supposed to

V., c. 3; Paston Letters, Vol. III., Lett. 109, from the Under Sheriff, saying, "I purpose, as I will answer God, to return the due Election, nevertheless I have a Master;" also Vol. III., Letter 36; Vol. IV., Letter 6 and 8.) And although a King of this nation once adopted the iniquitous measure of appointing to the office of Sheriff, the great champions of the liberties of the Country, in order to prevent them from expressing in Parliament those sentiments and opinions to which no satisfactory answer could be given in a Constitutional way; yet on other occasions, the Crown has frequently availed itself of the agency of a presiding officer of its own nomination, in order to exercise an undue influence over the election of Members of Parliament. (See the Articles against Rich. II., Howell's St. Tr.; Holinshed, Hayward, Strype's Eccl. Mem., Vol. II., p. 394, Vol. III., p. 155; Strype's Annals, Vol. I., p. 32; Reresby's Memoirs, p. 80; for the circumstances attending Sir E. Coke's Appointment, and the Law relative to the Case, 1 Rush., p. 197; Strafford's Lett. and Disp., p. 29; Douglas on Elections, Southampton Case, Abingdon Case.) The safeguard which in the present day is opposed to the partiality of the Sheriff, may be considered as one of the fruits of the Revolution. (Stat. 10 and 11 William III.; Case of Ashby and White, Hargr. St. Tr., and see the Debate on the Westminster Scrutiny, Parl. Deb. A. D. 1784.) The corruption of Sheriffs in composing the panels of Jurymen, was a serious impediment to the administration of Justice in early times. We read of its being common to charge, in an attorney's bill, pro amicitiâ Vicecomitis. It appears from the Paston Letters, that it was not unusual to procure a King's letter to obtain the Sheriff's favor on an approaching trial, the price of which was generally a Noble. The misconduct of Sheriffs in this branch of their duty, is recited as one of the reasons for establishing or remodelling the Star Chamber, in the Act of Henry VII. which relates to that tribunal.

be, that he would cause to come before them, at a certain day, by them appointed, *twelve good and lawful men* of the neighbourhood, where the fact is supposed, who stand in no relation to either of the parties who are at issue, in order to enquire and know upon their oaths, if the fact be so as one of the parties alleges, or whether it be as the other contends it, with him. At which day the Sheriff shall make return of the said writ before the same Justices, with a *panel* of the names of them whom he had summoned for

("Camera Stellata" by Mr. Tate in Hearne's Disc.; Hume's Append. to the Reign of Henry VII.; Paston Letters, Vol. III., Letter 76, and several others in the same Collection; St. 18 Hen. VI., c. 14, for recovering Bribes from the Sheriff, given him to return Juries; Barrington's Observations on 11 Henry VII.) But it was in the reign of Charles II. that the mischief which may arise from the authority of the Sheriff, in matters of judicature, when it is perverted for the purpose of abetting a wicked exercise of the prerogative, was most strikingly evinced. (Harris's Life of Charles II.; Burnet, Vol. I., p. 536.) A desire of securing the obedience of the Sheriffs of London, in order to put a stop to the "reign of Ignoramus" is avowed by North in his Examen, to have been the motive for procuring the forfeiture of the City's Charter: and the same author, in his attempt, in another work, to panegyrize his relation, Lord Keeper Guilford, for his conduct on the occasion of the election of the London Sheriffs, has handed down his name to all posterity, as a paragon of servility, dishonesty and injustice. When it is considered by what persons the Juries of the City of London were returned in the latter years of Charles II., the authority of their verdicts is annihilated: and we must acknowledge the truth of the comparison made by a great statesman, between the conduct of Charles, and that of Tiberius, who seldom put his victims to death without a decree of the Senate.

that purpose. In case they appear, either party may *challenge* the *array*, and allege that the Sheriff hath acted therein partially, and in favour of the other party, (viz.) by summoning such as are too much parties in the cause and not indifferent; which exception, if it be found to be true upon the oath of two men of the same *panel*, pitched on by the Justices, the *panel* shall immediately be quashed, and then the Justices shall write to the Coroners of the same County, to make a new *panel;* in case that likewise should be excepted against, and be made appear to be corrupt and vicious, this *panel* shall also be quashed. Then the Justices shall choose two of the clerks in Court, or others of the same County, who, sitting in the court, shall upon their oaths, make an indifferent *panel*, which shall be excepted to by neither of the parties; but, being so *impanelled*, and appearing in Court, either party may except against any particular person; as he may at all times, and in all cases, by alledging that the person so *impanelled* is of kin, either by blood or affinity to the other party; or in some such particular interest, as he can not be deemed an indifferent person to pass between the parties: of which sort of exceptions there is so much variety, as is impossible to shew in a small compass: if any one of the exceptions be made appear to the Court to be true and reasonable, then he against whom the exception is taken, shall not be sworn, but his name shall be struck out of the *panel:* in like manner shall be done with all the rest of the *panel*, until twelve be sworn: so indifferent, as to the event of the cause, that neither of the parties can have reasonable matter of challenge against them: out of these twelve, four, at the least, shall be Hundredors, dwelling in the Hundred where the *Vill* is situate, in which the fact disputed is supposed to be: and every one of the *Jury* shall have lands, or reve-

nues, *for the term of his life*, of the yearly value at least of *twelve scutes*.[1] This method is observed in all actions and causes, *criminal*, *real* or *personal;* except where, in personal actions, the damages, or thing in demand, shall not exceed *forty marks*[2] English money: because, in such like actions of small value, it is not necessary, nor required, that the Jurors should be able to expend so much; but they are required to have lands or revenues, to a competent value, at the discretion of the Justices; otherwise they shall not be accepted; lest, by reason of their meanness and poverty, they may be liable to be easily bribed, or suborned: and in case, after all exceptions taken, so many be struck out of the panel, that there does not remain a sufficient number to make up the *Jury*, then it shall be given in charge to the Sheriff, by virtue of the King's writ, that he add more *Jurors;* which is usually and often done, that the enquiry of the truth upon the issue in question may not remain undecided, for want of Jurors. This is the form how Jurors, who enquire into the truth, ought to be returned, chosen and sworn in the King's Courts of Justice: it remains to enquire and explain how they ought to be charged and informed as to their declaration of the truth of the issue before them.[3]

[1] The scute, or crown, was a gold coin of the value of three shillings and fourpence.

[2] A coin of the value of thirteen shillings and fourpence.

[3] In this chapter, Fortescue directs the attention of the Prince to some of the leading features of the trial by Jury: it will be noticed, that several of the principles upon which that institution was originally founded, have undergone essential alterations. The qualification of neighbourhood has been materially affected by Statute: and the private knowledge of Jurors is not at present

Chap. XXVI.—*How Jurors are informed by Evidence; the Way of Proceeding in Civil Causes.*

Twelve good and true men being sworn, as in the manner above related, legally qualified, that is, having over and

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deemed a proper cause for their decision; whereas so late as the time of Charles II., it was considered by the Courts, that the greater and better part of the evidence, which should sway the minds of the Jury, might be unknown to the Judge: an infraction of the right of being tried by Peers of their vicinage, was alleged by the American States as one of the grounds of their quarrel with Great Britain. (Memoirs of Franklin, 1, p. 462; per C. J. Vaughan, Case of Bushell's Habeas Corpus; and see C. J. Pemberton's Charge to Lord Shaftesbury's Grand Jury. Concerning the Period when the Principle came to be changed, 3 Bl. Comm. 374; Styles, 233; 1 Sid. 133.) The qualification of freehold has been greatly modified by the Legislature: it was, however, insisted upon as indispensable in trials for High Treason, by a clause in the Bill of Rights, a circumstance which was owing to the celebrated discussion upon the subject in the case of Lord Russell. In High Treason, likewise, the subject is furnished by Statutes passed since the Revolution, with an advantage in the challenging of the Jurors, which he did not possess at Common Law, by supplying him with the names, professions and abodes of the Jurors, at a specified period before the trial. Foster expresses a doubt, whether, by the Law, as it is now settled, a prisoner accused of treason, is not invested with privileges too great for the purposes of equal justice. But, as far as the power of challenging is concerned, the prisoner will be thought to be entitled to every facility, when it is considered, that, by the rules which the Courts have established, he can not defer making his challenge in any instance, for the purpose of ascertaining whether the Counsel for the Crown intend to offer theirs; that no cause can be required to be shewn

besides their moveables, possessions in land sufficient (as was said) wherewith to maintain their rank and station; neither suspected by nor at variance with either of the parties; *all of the neighbourhood;* there shall be read to them in English, by the Court, the *Record* and nature of the plea, at length, which is depending between the parties; and the *Issue* thereupon shall be plainly laid before them concerning the truth of which those who are so sworn are to certify the Court: which done, each of the parties, by themselves or their Counsel, in presence of the Court, shall

on the part of the prosecution, until all the panel has been gone through; and that the great size of the panels, which has been allowed in trials for High Treason, combined with these two circumstances, operates to invest the Crown with the power of arbitrarily rejecting Jurors. (See the Cases of O'Coigly and Horne Took, for Treason, Howell's St. Tr. and References, ibid.) A very important alteration has taken place in the ancient law respecting Juries, by the practice of striking Special Juries in cases of misdemeanor. The Statute of 3 George II., recognizes this usage as being then long established. The reader will find the objections, which have been made to the use of Special Juries in State prosecutions, urged with great ability by the defendant, in the case of the King *v.* Horne, 11th St. Tr., and in a letter addressed by Lord Lyttleton to a Member of Parliament, which is published in his works. Previous to the Statute of William, the trial of a Peer in the High Steward's Court, afforded opportunities for the most flagrant injustice, since the selection of the Lords who were to try the prisoner, was virtually the act of the Crown, and there existed no right of challenge. A single historical fact will illustrate the danger to which Peers were liable to be exposed by such an unfair mode of procedure. At the trial of the Protector, Somerset, Northumberland, Northampton, and Pembroke, sat among his Judges.

declare and lay open to the *Jury* all and singular the matters and evidences whereby they think they may be able to inform the Court concerning the truth of the *point in question;* after which each of the parties has a liberty to produce before the Court all such witnesses as they please, or can get to appear on their behalf; who being charged upon their oaths, shall give in evidence all that they know touching the truth of the fact, concerning which the parties are at *issue:* and, if necessity so require, the witnesses may be heard and examined apart,[1] till they shall have deposed all that they have to give in evidence, so that what the one has declared shall not inform or induce another witness of the same side, to give his evidence in the same words, or to the very same effect. The whole of the evidence being gone through, the *Jurors* shall confer together, at their pleasure, as they shall think most convenient, upon the truth of the issue before them; with as much deliberation and leisure as they can well desire, being all the while in the keeping of an officer of the Court, in a place assigned to them for that purpose, lest any one should attempt by indirect methods to influence them as to their opinion, which they are to give in to the Court. Lastly, they are to return into Court and certify the Justices upon the truth of the issue so joined, in the presence of the parties, (if they please to be present,) particularly the person who is plaintiff in the cause; what the *Jurors* shall so certify in the Laws of England, is called the *Verdict.* In pursuance of which *verdict,* the Justices shall render and form their judgment. Notwithstanding, if the party, against whom such verdict is obtained, complain that he is thereby aggrieved,

[1] See the Cases of Cook and of Vaughan, tem. Will. III., Hargr. St. Tr.

he may sue out a writ of *Attaint*, both against the Jury, and also against the party who obtained it; in virtue of which, if it be found upon the oath of *twenty-four men* (returned in manner before observed, chosen and sworn in due form of law, who ought to have much *better estates* than those who were first returned and sworn,) that those, who were of the original *panel* and sworn to try the fact, have given a verdict, contrary to evidence, and their oath; every one of the first *Jury* shall be committed to the public gaol, their goods shall be confiscated, their possessions seized into the king's hands, their habitations and houses shall be pulled down, their woodlands shall be felled, their meadows shall be plowed up, and they themselves shall ever thenceforward be esteemed, *in the eye of the Law*, infamous, and in no case whatsoever are they to be admitted to give evidence in any Court of Record: the party, who suffered in the former trial, shall be restored to every thing they gave against him, through occasion of such their *false verdict:* and, who then (though he should have no regard to conscience or honesty) being so charged upon his oath, would not declare the truth from the bare apprehensions and shame of so heavy a punishment, and the very great infamy which attends a contrary behaviour? and if, perhaps, one or more amongst them should be so unthinking or daring, as to prostitute their character, yet the rest of the *Jurors*, probably, will set a better value on their reputations than suffer either their good name or possessions to be destroyed and seized in such a manner: now, is not this method of coming at the truth better and more effectual than that way of proceeding, which the Civil Laws prescribe? No one's cause or right is, in this case, lost, either by death or failure of witnesses The *Jurors* returned are well known;

they are not procured for hire; they are not of inferior condition; neither strangers, nor people of uncertain characters, whose circumstances or prejudices may be unknown. The *witnesses* or *Jurors are of the neighbourhood*, able to live of themselves, of good reputation and unexceptionable characters, not brought before the Court by either of the parties, but chosen and returned by a proper officer, a worthy, disinterested and indifferent person, and obliged under a penalty to appear upon the trial. They are well acquainted with all the facts, which the evidences depose, and with their several characters. What need of more words? There is nothing omitted which can discover the truth of the case *at issue*, nothing which can in any respect be concealed from, or unknown to a *Jury* who are so appointed and returned, I say, as far as it is possible for the wit of man to devise.

Chap. XXVII.—*The Way of Proceeding in Capital Cases.*

It becomes now absolutely necessary to inquire thoroughly how the Laws of England come at the truth in cases criminal; whereby the form of proceedings in both laws being made appear, we may the better judge which law does most effectually discover the truth. If any suspected person who stands accused for felony or treason committed in England, denies the crime of which he stands accused, before his Judges: the Sheriff of the County where the fact is committed, shall cause to come before the same Judges *twenty-four* good and lawful men of the neighbourhood to the Vill where the fact was done, who are in no wise allied to the person accused, who have lands and revenues to the value of an *hundred shillings;* and they are to certify to the Judges upon the truth of the fact, where-

with the party is charged. Upon their appearance in Court, as they come to the book to be sworn, before they be sworn, the person accused may *challenge* them, in the same manner as is above described, and as is usually done in *real actions*. Further, in favour of life, he may challenge *five and thirty;* such as he most feareth and suspecteth, who, upon such challenge shall be struck out of the *Panel*, or such marks set over against their names, that (to use the *term* in law) they shall not pass upon him in trial; and this *peremptorily*, without assigning any cause for such challenge; and no exceptions are to be taken against such his challenge: who then in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favour of life: none but his neighbours, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused, guilty. Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally. Neither can there be any room for suspicion, that in such a course and method of proceeding, a guilty person can escape the punishment due to his crimes; such a man's life and conservation would be restraint and terror sufficient to those who should have any inclination to acquit him: in a prosecution, carried on in this manner, there is nothing cruel, nothing inhuman; an innocent person can not suffer in life or limb: he has no reason to dread the prejudice or calumny of his enemies; he will not, can not, be put to the rack, to gratify their will and pleasure. In such a Constitution, under such laws, every man may live safely and securely. Judge then, good Sir! which law

is rather to be chosen, putting yourself in the private capacity of a subject.[1]

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[1] In the two preceding chapters, Fortescue considers the evidence in a trial, the verdict of the Jury, and their responsibility in the discharge of the duties confided to them. It will be observed that the Jurors in the course of this treatise are frequently called testes; it would seem that they were originally the only witnesses in every cause, agreeably to the maxim, "vicini vicinorum præsumuntur scire:" and that when any of the Jury protested ignorance of the matter in dispute, they were removed, and their places supplied by others. (Reeves's History of the Law, Henry III., Edw. I.) The essential alteration, which has since taken place in the character of the Jury, does not appear to have been thoroughly effected till the times of Edward VI. and Mary. Many changes of a very important description have been made in the rules of the Courts, respecting the conduct of a trial. As regards the evidence on the part of the prosecution, the prisoner was for a long time debarred the privilege of cross-examining the witnesses brought against him: a privilege which Lord Camden, in the case of the Dutchess of Kingston, speaks of with enthusiastic eloquence; yet written examinations were on many occasions produced in evidence for the Crown, not signed by the witnesses, and frequently made by persons who had themselves been capitally convicted. (Amongst others, the Cases of Sir N. Throgmorton, Udall, the Duke of Norfolk, Sir Walter Raleigh; and see Foster's Discourse on Treason.) A practice of interrogating the prisoner upon his trial, for the purpose of establishing the charge against him, or taking off the effect of his defence, appears to have formerly prevailed in the Courts of Justice of this Country. (See the Cases of Sir N. Throgmorton, Whitebread, Langhorne, Gaunt; and since the Revolution, the Cases of Ashton and Sir W. Parkyns) By the Statute of Edward the Sixth, two witnesses were required in prosecutions for High Treason, and they were to be produced in open Court. The singular vicissitudes attend-

Chap. XXVIII.—*The Prince owns his Conviction, that the Laws of England are much more commodious for the Subject, as to the Proceedings in the foregoing Instances, than the Civil Law.*

To whom the Prince—I see no difficulty at all in the case, my good Chancellor, to make me hesitate, or waver

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ing this Statute, are detailed by Mr. Justice Foster in his Discourse upon High Treason, and by Mr. Reeves in his History of the Law. At first slighted, before any attempt was made to invalidate it; afterwards, from an early period of the reign of Mary till the Commonwealth, treated as repealed: acknowledged to be in force under that Government; regarded as unquestionable Law after the Restoration; and finally cleared from equivocal meaning and sophistical interpretations by the Treason Act of William the Third. The nature and functions of the Grand Jury in ancient times, may be collected from what Glanville has written concerning the "fama publica;" and from the chapter in Bracton respecting the proceedings "per famam patriæ." (Glanville, lib. xiv., c. 1; Bracton, lib. iii., c 22, and see Kelham's Briton, p. 18, n. 15, a record of an Indictment on Suspicion.) In the reign of Charles II. it became an object of deep national concern, to ascertain the evidence which a Grand Jury ought to require in support of indictments preferred before them in the absence of the party accused. C. J. Pemberton instructed a Grand Jury, that it was not competent to them to examine the credit of the King's witnesses, and that they ought to be satisfied with any ground the Crown might shew for calling upon the prisoner to answer the imputed charge. This Grand Jury refused to act upon the advice of the Judge, which they conceived to be at variance with the principles upon which their institution was founded, and accordingly ignored a bill that had been preferred against the celebrated Lord Shaftesbury. Lord Somers has defended the propriety of

as to the choice I am to make; particularly in the manner you require and propose. For, who would not rather live

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their conduct in a celebrated Tract upon the duty of Grand Juries, in which he repeatedly appeals to the authority of Fortescue, and maintains "that the Constitution intrusts such inquisitions in the hands of persons of understanding and integrity, indifferent and impartial, that might suffer no man to be falsely accused or defamed, nor the lives of any to be put in jeopardy by the malicious conspiracies of great or small, or the perjuries of any profligate wretches." (Lord Somers on Grand Juries; Security of Englishmen's Lives, Tracts, tem. Car. II.; Dryden's Medal, with the Notes of Sir W. Scott; Sir J. Hawles's Remarks on Lord Shaftesbury's Grand Jury; North's Examen, and the Tracts of the time respecting "Ignoramus.") With respect to the evidence adduced on the part of the prisoner in his defence, Mary was the first English Sovereign who recommended to her Judges to allow, as a favor, of witnesses being brought against the Crown; but they did not always adopt this course of proceeding. (4 Bl. Comm., p. 359; Sir N. Throgmorton's Case, Hargr. St. Tr.) It was not until the Statute of William, which is applicable to cases of treason only, that the attendance of witnesses for the prisoner was compulsory; nor until the Statute of Anne, that they were examined upon oath in treason and felony. (3 Inst. 79; and see Observations upon the Ancient Rule, and its effects in the Case of Fitzharris, Sir J. Hawles's Remarks on Colledge's Case.) The Act of William first enabled Counsel to conduct the prisoner's full defence in trials for treason, in which he was not entitled to any assistance even for the examination of witnesses: the like privilege was not conferred in cases of impeachment until the 20th George II. The difficulties with which a prisoner had to contend in State prosecutions before the Revolution, are thus detailed by Sir J. Hawles: "A man is by a messenger, without any indictment precedent, which by the Common Law ought to pre-

under a law which renders life secure and happy, than where the law is found insufficient for protection, and leaves

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cede, or any accuser or accusation that he knows of, clapt up in close prison, and neither friend or relation must come to him; he must have neither pen, ink or paper, or know of what or by whom he is accused; he must divine all, and provide himself a counter-evidence without knowing what the evidence is against him. If any person advise or solicit for him, unless assigned by the Court before which he is tried, they are punishable: he is tried as soon as he comes into the Court, and therefore of a Solicitor there is no occasion or use: if the prisoner desires Counsel upon a point of law, as was done in my Lord Russell's trial, the Counsel named must be ready to argue presently, and the Court deliver their judgment presently without any consideration. The prisoner, indeed, hath liberty to except to twenty-five of the Jury peremptorily, and as many more as he hath cause to except to, but he must not know beforehand who the Jury are; but the King's Counsel must have a copy of them: he must hear all the witnesses produced to prove him guilty together, without answering each as he comes, for that is breaking in upon the King's Evidence, as it is called, though it hold many hours, as it happened in most of the trials: he must not have any person to mind what hath been sworn against him, and forgotten by him to answer: there is a proclamation to call in all persons to swear against him, none for him; as many Counsel as can be hired are allowed to be against him, none for him. Let any person consider truly these circumstances, and it is a wonder how any prisoner escapes." The foregoing is far from being a complete enumeration of the severities to which the prisoners were formerly subjected on their trials. The trial of Colledge, which gave rise to these remarks of Sir J. Hawles, and other cases in the collection of the State Trials, exhibit many more diversified forms of oppression. Neither were all these rigorous modes of procedure, against which Sir J. Hawles inveighs, abandoned immediately after the Revolution;

a man defenceless, under a series of insults and barbarities from one's enemies? That man can not in any wise be safe

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for we find that several of them were put in practice at the trials of Lord Preston, and Ashton, of Anderton, and of the conspirators engaged in the Assassination Plot. And every impartial mind will reflect with horror on the atrocious conduct of that Government, which, after the passing of the Treason Act, could bring individuals to their trial, and put in force against them those cruel regulations which it was the object of that Statute to abolish; at a moment when the time for the operation of the new law was speedily to commence, and in one instance, when the next day would have conferred the benefits of it upon the prisoner. It is likewise deeply to be lamented, that the strenuous opposition which the Treason Bill encountered in its progress through the Houses of Parliament, can not fail to blacken the memory of several individuals, who are otherwise endeared to posterity by the magnitude of their claims upon the gratitude of this nation. A striking difference between the form of ancient and modern trials in *civil* matters, is in the manner of counting or pleading, which appears from the first reports remaining of our legal proceedings, to have been originally *vivâ voce*. Some curious specimens of this practice, of a very early date, are given by Mr. Reeves in his History of the Law, which resemble the scholastic disputations, so fashionable in those days. (Reeves's History of the Law, Edw. I., Edw. II.) A distinguishing characteristic of the *Verdict* is the requisite unanimity of the Jurors. In ancient times it was in the power of the Judge, when there was a division of opinion among the Jurymen, to afforce the Assize, that is, to dismiss the minority and to substitute new Jurors continually until an unanimous decision of twelve persons was obtained. (Glanville, lib. ii., c. 17; Bracton, lib. iv., c. 19; Fleta, p. 230.) So, in ancient times. verdicts were often taken according to the voice of the majority, or, as it was termed, "ex dicto majoris partis." (2 Hale P. C., p. 297; Fitz. Ab. Verd. 40; Bro. Ab.

either in his life or property, whom his adversary (in many cases which may happen) will have it in his power to con-

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Jurors, 53.) However, it became settled by a solemn decision in the reign of Edw. III. that a verdict by less than twelve Jurors was nugatory. (41 Ass. 11.) And it is doubtful whether the contrary rule ever prevailed in prosecutions. (Fleta, p. 52; Kelh. Brit., p. 42.) Lenity to the prisoner in criminal cases, and in civil the practice of attaints, are supposed by Barrington to have been the causes for requiring the *unanimity* of Juries by our law. (Barrington's Observations on 29th Chap. of Magna Charta.) Incidental to the same regulation is the custom of withholding all refreshment from Juries until they have delivered their verdict. Barrington conjectures from the recital of an ancient Statute, that the object of this rule was to prevent opportunities of bribery. Others have thought that it arose from a desire to preserve decorum in Courts of Justice, by prohibiting legal proceedings after indulgencies at the table, and confining them to the time of morning, when the mind is in greatest vigor. And this hypothesis derives countenance from some of the institutions of Greece and Rome, and from the language of the Canons of the Church. (Taylor's Civil Law, p. 399; Spelman on Terms; Barrington's Observations on the 34th and 35th Henry VIII.) There are many cases in the State Trials, in which the Juries appear to have suffered great hardships on account of their being denied refreshment and necessary comfort. (Clarkson's Life of Penn, Vol. I., p. 77; Cases of Penn and Meade, of the Seven Bishops, Lilburne, Archibald Hamilton, in the State Trials; Barrington's Observation on 34 and 35 Henry VIII., where see the passage from Stiernhook de jure Sueonum. Also, Emlyn's Remarks upon the Subject, in the Preface to Hargr. St. Tr., as to carrying the Jury about in Carts till they have agreed; 19 Ass. 6; 41 Ass. 11.) In recent times, the unusual length of trials has sometimes dictated the necessity of an adjournment. (Barrington's Observations on 34 and 35 Henry VIII., and see the References in the Discussion

vict out of the mouth of *two* witnesses, such as are *unknown*, produced in court and pitched upon by the prosecutor. And,

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of the Subject, Hardy's Case, St. Tr.) So there are several instances in which a Jury has been dismissed before giving their verdict. (See the Opinions in Sir J. Wedderburn's Case, Foster's Crown Law.) But the adoption of this measure simply with the design of deferring a trial, because the evidence of the Crown is found insufficient for the purpose of conviction, will ever be stigmatized as of a piece with the rest of the proceedings against the persons suspected of the Popish Plot. The distinction between the province of the Jury and that of the Judge is an important consideration, arising out of the enquiry respecting the verdict. This is a question which, from its relation to prosecutions for political libel, has given rise to more interesting discussions, than perhaps any other subject connected with the jurisprudence of the Country. (Parliamentary Debates, A. D. 1792, particularly the Opinion of the Judges, the Protest of the Lords, Lord Mansfield's Paper, left with the Clerk of the House of Lords, and the Questions propounded to Lord Mansfield by Lord Camden; Case of the Dean of St. Asaph, St. Tr. Hargr.; Co. Litt. 155 *b.*, n. 5; Wynne's Eunomus, Dial. iii. Among the older authorities, Bracton, lib. iv., c. 19; Hobbes's Dialogue between a Lawyer and Philosopher, p. 625; Leviathan, c. 25; Lord Clarendon's Survey of the Leviathan, p. 129.) Another circumstance to which the consideration of the verdict leads, is the influence that Juries have had in interpreting and modifying the laws. This is a singular fact in the History of the Constitution of this Country, but which has hitherto been little remarked: some valuable observations on the subject will be found in Lord J. Russell's Essay on the English Government; and in a late prosecution for murder in a duel in Scotland, the topic was introduced with great ability by the counsel for the defence. (See Printed Trial for the Murder of Sir A. Boswell.) With respect to the penal consequences attaching to Jurors on account of their verdict, it is remarkable

though in consequence of their evidence, he be not punished with death, yet an acquittal will not leave him in a

how often the complaint against them, for perjury, is repeated in ancient Statutes, and not against the witnesses produced at trials. (Barrington's Observations on 11 Henry VII.; St. 38 Edw. III.; 3 Henry VI. 23, c. 10; 6, c. 1; 8, c. 1; with the Titles Embracery and Decies Tantum, in the Digests.) Scarcely less objectionable than direct bribery was the custom which formerly prevailed of entertaining the Jury, after giving their verdict, at the expense of the successful party. Sir T. Smith, in his Commonwealth, mentions this to have been the usage in his time: and a very curious example of it occurs in a letter written to Archbishop Sancroft, by the Solicitor employed for the Seven Bishops. (Doyley's Life of Sancroft. See also Sir J. Hawles's Remarks on Lord Russell's Case, for the Conduct of the Government in this respect during the reign of Car. II.) The doctrine of attaint is now, as Lord Mansfield observed, a mere sound in every case, and in many cases it did not ever pretend to be a remedy. (Bright *v.* Eynon, 1 Burr. 390; Com. Dig. Attaint.) The practice of granting new trials has entirely superseded it; a practice which may be traced as high as the year A. D. 1655, and perhaps the reason it can not be traced earlier, is, that the old reports do not give any account of determinations made by the Courts upon motions. Barrington states, that no prosecution by attaint had been carried on against a Jury for the last three hundred years: Sir T. Smith (who wrote his Commonwealth of England in the year A. D. 1565) accounts for attaints being disused, and amongst other reasons he says, that it was very difficult to procure the attendance of a Jury, in this sort of trial; as people were very averse to be instrumental in inflicting upon their neighbours the severe penalties ensuing upon a conviction. (Barrington's Observations on West, 1.; Sir T. Smith de Rep., lib. iii., c. 2; 3 Inst. 222. For the Law in the time of Fortescue, the Statutes, Henry VI. 11, c. 4; 15, c. 5; 18, c. 2.) It has been observed by Mr. Brodie, in his History of

much better condition after *the question* has been put, which can not but affect the party with a contraction of

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the British Empire, that Fortescue, while he speaks of the attaint never gives a hint of any power to try or punish a Jury except in that way. This remark is important with reference to the question, respecting the antiquity of the Star Chamber: for it has been contended, that this Court must have been of very early institution, because it is to be supposed that there existed somewhere a power to restrain the corruption of Juries, and it was found that one Jury would seldom attaint another. In the controversy upon this subject, the testimony of Sir T. Smith has been cited for the purpose of shewing that the Star Chamber for a long time seldom ventured to punish Juries, though it affected the right. Speaking in the reign of Queen Elizabeth, he says, that although Juries were often commanded to appear before the Court of Star Chamber, the matter was commonly passed over with a rebuke: he specifies only two instances, and those occurring in a previous reign, in which Juries had been fined; "but," says he, "those doings were even then of many accounted very violent, tyrannical, and contrary to the liberty and custom of the Realm of England." Examples are too frequent in English history, of severities having been exercised against Jurymen, on account of their delivering verdicts which were displeasing to the ruling power of the State, and to none does the infamy of such proceedings attach with a deeper dye than to Cromwell. (Lord Herbert's Henry VIII., p. 6; the Cases of Throgmorton's and Lilburne's Juries, in the St. Tr., and see "The World's Mistake in Oliver Cromwell," Harl. Misc.) In the reign of Charles II., Bushell was brought before the Court of Common Pleas, upon a habeas corpus, by which his commitment appeared to be expressed in the following terms: "That being a Juryman among others charged at the Session Court of the Old Bailey, to try the issue between the King, and Penn and Meade, upon an indictment for assembling unlawfully and tumultuously, he did 'contra plenam et manifestam eviden-

his sinews and limbs, attended with constant disorders and want of health. A man, who lives under such a government, as you describe, lives exposed to frequent hazards of this sort: enemies are designing and desperately wicked. Witnesses can not well bring about such a wicked device, when, what evidence they give in, must be in open Court, in the presence and hearing of a *jury* of twelve men, persons of good character, neighbours where the fact was committed, apprised of the circumstances in question, and well acquainted with the lives and conversations of the witnesses, especially as they be near neighbours, and can not but know whether they be worthy of credit, or not: it can not be a secret to every one of the Jury what is done by, or amongst their neighbours. I know of myself more certainly what is a doing at this time in Barrois, where I reside, than what is doing in England: neither do I think it possible that such things can well escape the observation and knowledge of an honest man, as happen so near to his habitation, even though transacted with some kind of secrecy. But, since these things are so, I admire very much that the law of England, which in this respect is so commodious and desirable, should not obtain all the world over.[1]

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tiam' openly given in Court, acquit the prisoners indicted." Vaughan, the Chief Justice, discharged the juryman, and, in an admirable argument, maintained the invaluable doctrine, that the Jury, in the delivery of their verdict, which is a judicial function, are unaccountable to any power in the State.

[1] The institution of the Jury possesses a decided advantage over every other judicial method of investigating facts, principally on account of its publicity, and of the participation in the administration of justice, into which the country at large are thereby ad-

CHAP. XXIX.—*The Reasons why Inquests are not made up of Juries of twelve Men in other Countries.*

Chancellor. At the time your highness was obliged to quit England, you were very young, consequently the natural disposition and qualities of your native country could not be known to you; had the case been otherwise, upon a comparison of the advantages and properties of other countries with those of your own, you would not be surprised at those things which now agitate and disturb you. England is a country so fertile, that, comparing it acre for acre, it gives place to no one other country: it almost produces things spontaneously, without man's labour or toil. The fields, the plains, groves, woodlands, all sorts of lands spring and prosper there so quick, they are so luxuriant, that even uncultivated spots of land, often bring in more profit to the

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mitted: the Civil Law was not, however, so inferior to our own, as Fortescue represents, in the calculation of probabilities for the ascertainment of truth: the following passage from the Digest, containing some observations of the Emperor Adrian, on the subject of evidence, will be sufficient to shew, that numerical testimony had not that influence upon judicial determinations, which Fortescue would insinuate: "Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest: sicut non semper, ita sæpe sine publicis monumentis cujusque rei veritas deprehenditur; alias numerus testium, alias dignitas et auctoritas, alias veluti consentiens fama confirmat rei, de quâ quæritur fidem. Hoc ergo solum tibi rescribere possum summatim: non utique ad unam probationis speciem cognitionem statim alligari debere, sed ex sententiâ animi tui te æstimare oportere, quid aut credas, aut parum probatum tibi opinaris."

occupant, than those which are manured and tilled; though those too are very fruitful in plentiful crops of corn. The feeding lands are likewise enclosed with hedge rows and ditches, planted with trees, which fence the herds and flocks from bleak winds and sultry heats, and are for the most part so well watered, that they do not want the attendance of the *hind*, either day or night. There are neither *wolves*, *bears*, nor lions in England; the sheep lie out a nights without their shepherds, penned up in folds, and the lands are improving at the same time;[1] whence it comes to pass, that the inhabitants are seldom fatigued with hard labour, they lead a life more spiritual and refined: so did the Patriarchs of old, who chose rather to keep flocks and herds, than to disturb their peace of mind, with the more laborious employments of tillage and the like: from hence it is, that the common people of England are better inclined and qualified to discern into

[1] There is evidence both of wolves and bears having existed in this country. (Camden's Brit. Derbyshire, Yorkshire, Caledonia; Archæol. Antiq. Soc., Vol. III., p. 3, Vol. X., p. 162; Dugdale's Warwickshire, p. 298; Pennant's Zoology, p. 163.) And notwithstanding the account given by Fortescue, of the prolific nature of the English soil, we meet with repeated instances of famines, attended with dreadful consequences, from the time of the Conqueror, to that of Henry VI.: indeed, in the same reign in which Fortescue wrote, wheat was selling from 2*s.* 6*d.* to 3*s.* 4*d.* the bushel, and the poor people were obliged to make themselves bread of fern and oats. (Strutt's Antiq., Vol. II., "on the Husbandry of the English." Respecting the Nature and Extent of the ancient Woodlands, Evelyn's Sylva, Lib. iii., c. 6. For other circumstances respecting the ancient Condition of the Country, see Tracts on the Vineyard Controversy; and for general descriptions, Pref. to Harrington's Oceana; Sir W. Temple on Gardening.)

such causes, which require a nice examination, than those who dwell upon their farms, and are constantly employed in husbandry affairs, whereby they contract a rusticity of understanding.[1] England is so thick-spread and filled

[1] The fleeces of this country are noticed by many old authors: thus an ancient writer, addressing himself to England, says, "Licet maris augustata littoribus brevi terræ spatio distendaris, tibi tamen ubertatis tam famosæ per orbem benedixerunt omnium littora nationum de tuis ovium velleribus calefacta." Several causes conspired to give a pre-eminence to pasturage over agriculture. The dealing in grain was subjected to many impolitic restrictions, arising from mistaken views upon the subject of population, and from absurd apprehensions of the consequences of forestalling; an offence, which, in the legislative rhetoric of the time of Edward I., was denounced as rendering a man "totius communitatis et patriæ publicus inimicus." The settling also of Flemings in this country, and the protection afforded by several Statutes, tended to increase the importance of our woolen manufactures. But another cause of more effectual operation remains to be noticed, for before the time when Fortescue's book was written, an alteration in the habits of the aristocracy had commenced, and they began to be induced, from a motive of increasing their revenues, to dismiss their numerous adherents, and to let their lands in large tracts, to persons who would pay considerable rents: which practice speedily introduced an extensive system of pasturage. (See Brodie's British Empire, Vol. I, pp. 19, 29; a Proclamation, A. D. 1521, cited by Stow. Rossi. Hist., pp. 39, 88, 114: Rous died at an advanced age, A. D. 1491.) A system that finally occasioned a striking alteration in the appearance of the country. It is with reference to this circumstance, that Sir T. More, speaking of the sheep, says, that they had become, "tam edaces, tamque indomiti, ut homines devorent ipsos, agros, domos, oppida vastent ac depopulentur." (Sir T. More's Preface to his Utopia; Strype's Memorials, Vol. I., p. 392, Vol.

with rich and landed men, that there is scarce a small village in which you may not find a *knight*, an *esquire*, or some substantial householder, commonly called a Frankleyne; all men of considerable estates: there are others who are called Freeholders, and many Yeomen of estates sufficient to make a substantial Jury, within the description before observed. There are several of those Yeomen in England who are able to dispend by the year a *hundred pounds*, and more: *Juries* are very often made up of such, and, in causes of consequence, they consist of *knights*, *esquires*, and others, whose particular estates, in the whole, amount to upwards of *three hundred pounds* a year.[1] Where-

II., p. 141; and see Latimer's Account of the Circumstances of his own Family, first Sermon preached before King Edward.) The progress of this change in the occupations of the people, was in vain attempted to be restrained by the Legislature, and was pregnant with many consequences of great importance, both as they regarded the manners of the nation and the spirit of the Government. (See the Observations respecting the Statute for the Conservation of Farm Houses, in Bacon's Henry VII.; Bacon's Speech in D'Ewes's Journal, p. 551; Observations at the Close of Tirringham's Case, 4 Rep.; 3 Inst. 204; and the Statute of 25 Henry VIII., limiting the size of Flocks of Sheep, and the Preamble, which mentions the Extent of the Grievance then felt. With reference to the Effects of the System of Pasturage and Inclosure, upon the Progress of Towns, see 12 Rich. II., c. 5; 7 Hen. IV., c. 17; 2 Hen. V., c. 4; 4 Hen. V., c. 4.)

[1] Fortescue calculates the value of property by "skuta," which were gold coins of the value of 3*s.* 4*d.* (Fleetwood Chr. Pret., p. 23.) We find mention of several other foreign gold coins, circulating in this country, as Byzants and Florences, although our Sovereigns in the times of Edward III. and of Henry III., if not in the intervening reigns, made gold coins at their mints. (Liver-

fore it is not to be imagined that persons, in such wealthy circumstances, can be suborned or prevailed on to perjure themselves; they are supposed to be restrained, not only through a religious principle, but also as they regard their honour and reputation, as they would avoid the very great scandal and detriment which must accrue by such behaviour; and further, lest the infamy should extend to and affect their heirs. Other countries, my Prince, are not in such an happy situation, are not so well stored with inhabitants. Though there be in other parts of the world, persons of rank and distinction, men of great estates and possessions, yet they are not so frequent, and so near situated one to another, as in England; there is no where else so great a number of landowners: in a whole town, in any other country, you can scarce find a man of sufficiency enough to be put upon a *Jury:* for, except in large cities and walled towns, there are very few, besides the nobility, who are possessors of estates, or immoveable goods, to any considerable value. The nobility do not keep in their hands any great scope of feeding lands; it does not comport with their rank and quality to cultivate vineyards, or put their hands to the plough: and yet the main of their possessions consists in vineyards

pool on Coins, p. 38.) In Fleetwood's "Chronicon Pretiosum," is contained an account of the price of commodities and of labor, the worth of the precious metals, and the state of the coinage throughout the reign of Henry VI.; it consequently is calculated to afford a correct estimate of the value of money when Fortescue wrote. (See also Henry's History, Vol. V., p. 525; for the Value of Land in the time of Henry VI., Paston Letters, Vol. III., Lett. 21; and on the Depreciation of Money, Sir G. S. Evelyn's Endeavours to ascertain a Standard of Weight and Measure, Philosophical Transactions, A. D. 1798.)

and arable lands, except some meadow grounds, which lie along the great rivers, and the woodlands; the pasture of which is in common to their tenants and neighbours. How can it then be, that in such countries a *Jury* can be made up of *twelve honest men of the neighbourhood*, near where any fact in question is brought on to trial; seeing they can not be well called *of the neighbourhood*, who live at any remote distances? It will be very difficult to make up a *Jury* of twelve men, though remote from the place where the fact in question lies, after that the party accused shall have challenged his thirty-five peremptorily, who lived nearest to the place: wherefore in those countries they must make up a *Jury*, either of persons living at great distances from the place where the fact was committed; persons wholly unacquainted with the parties and their circumstances; or the *Jury* must consist of people of inferior rank, who have no proper notion, either of shame or infamy, who have no estates or characters to lose; so prejudiced and incapable in point of education, as to be unable clearly to discern on which side the truth lies. These things considered, you may cease, my Prince, your surprise, why that law, by means of which in England the truth is enquired into, is not in common to other countries, because other parts of the world can not furnish *Juries* of so great sufficiency, or equally qualified.[1]

[1] The Prologue to Chaucer's Canterbury Tales presents an interesting description of the Characteristic qualities, by which the middle ranks of the people were formerly distinguished. A particular account is there given of the knight, the esquire, the yeoman, and the Frankleyne, mentioned in the text. The distinctions of rank, which have been formed in this country, are important, as connected with the progress of national manners: in

CHAP. XXX.—*The Prince commends the Laws of England with respect to their Proceeding by Juries.*

Prince. Though we have already agreed in it that "comparisons be odious;" yet the Civil Law, as you have

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this point of view, the Statute of Henry V., of additions, deserves particular attention: Fuller, in his English Worthies, supposes that it was the circumstance of the insurrection of Wat Tyler, and Jack Straw, which made the English gentry desirous of not being confounded with the levellers and rabble; but the adoption of these distinctions in society, will probably be ascribed to the operation of more general causes: the same writer mentions, that in the reign of Henry VI., the addition "de" such a place came to be left off, and that of knight and squire to be assumed. Camden observes, that the name of esquire, which in ancient times was a name of charge and office, did not become a title of dignity till the reign of Richard II.; Spelman, in his Treatise upon Ancient Deeds, notices that some wrote themselves "armigeros," in the reign of Edward III.; but he agrees with Fuller, who says, that additions in writing, did not become usual till the time of Henry the Sixth, and he dates the general assumption of the title of esquire, from the reign of James: he mentions, that the addition of yeomen was seldom used in writings, until the reign of Henry VIII., a circumstance, which may be thought to receive illustration from the remark of Bacon, that Henry VII. amortized a great part of the land of the country to the occupation and hold of the yeomen, of a condition between gentlemen and peasants. This chapter will be read with considerable interest, as shewing the importance of the middle ranks of society, in the time of Henry VI. The reader may be induced to compare it with the Statute 23 Henry VI., c. 15, which points out the proper class of persons, out of which knights of the shire ought to be chosen; and the text may be thought to afford a valuable illustra-

made out the comparison, and set forth the reasons, is delivered from all imputation of blame or defect: for although

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tion of that most important Statute, passed in the same reign, which regulates the qualification of voters at county elections. In another point of view, the history of ranks in this country may be deemed of importance, when it is considered that the permanence and the improvement of the English Constitution is, in a great measure, owing to the absence of exclusive privileges, attached to the lesser nobility, and to the legal equality, for every essential purpose, of all ranks below the Peerage. (Sir T. Smith "de Republicâ," lib. i., c. 20, 21; Lord J. Russell on the Constitution, c. 1; Hallam, Vol. II., p. 198. For some Exceptions to this Principle, see Statute of Merton, c. 7; Statute 34 Edw. III., 3 Inst. 141; Britt., c. 25, fol. 49, *b.;* 23 Henry VI., c. 14.) Some writers have attributed much of the excellence of the Constitution to the circumstance, that the knights anciently sat in one assembly with the citizens and burgesses. (Lord J. Russell on the Constitution, c. 1; Hallam's Middle Ages, Vol. II., p. 8. See on this point, Append. to Hume's History, Vol. II. n. F.) Respecting the conferring of titles by the Sovereign of this country, it has been observed that Walsingham made several unsuccessful attempts to obtain the honor of knighthood at the hands of Elizabeth. (Welwood's Memoirs, p. 14.) The list of knights created by James, on his accession to the throne, in his way to London, may be seen in Mr. Ellis's recent collection of Original Letters. There issued many commissions at different periods, in pursuance of the Statute "de Militibus," for the purpose of compelling persons, of a certain estate, to take upon themselves the order of knighthood: this practice is supposed to have materially contributed to produce the troubles and distresses of the reign of Edward II.; and when revived by Charles I., it greatly augmented the public discontents: Mr. Brodie observes, that persons who came within the operation of this Statute, were not, on that account, authorized to use the title of knights. (Rymer's Fœd.,

you have preferred the Laws of England to it, yet the defect is not in the law itself; neither the Civil Law, nor the first legislators stand impeached: you have only demonstrated that the country, where it prevails, is the occasion of it; by means of which it does not so effectually get at the truth, in dubious cases, as the Laws of England do; that

Vol. XV., pp. 493, 497, 504; Barrington's Observations on 1 Edw. II., 2 Inst., p. 594; Vol. XIV. Arch. Antiq. Soc., p. 202; Clarendon's History, lib. i., p. 53; Brodie's History of the British Empire, Vol. II., p. 282.) The present chapter receives a particular illustration, from the circumstance, that a catalogue of the gentry of England was composed by Commissioners in the reign of Henry VI., of which an account is given in Fuller's Worthies; another, similar to it, was made in the reign of Henry VIII. The writings of our legal antiquarians abound with a variety of curious particulars explanatory of the early distinctions of ranks in this country. (See Copy from a Manuscript in the Harleian Library, respecting Esquires, Strutt's Antiquities, Vol. III., p. 15. Concerning the Appellation of Rascal, Sir T. Smith de Republicâ, lib. i., c. 21; Birch's Memoirs of Elizabeth, Vol. II., p. 508; D'Israeli's Curiosities of Literature. Of Knights, Selden's Titles of Honor; and see ibid., respecting the addition of "Chivalier" to Peers, and on the word "Sir," Spelman de Milite Dissertatio. Of the Franklin, 1st Part Shakespeare's Henry IV., Act 2, Scene 1; Cymbeline, Act. 3, Scene 2; and further, upon the Subject of Ranks and Precedency in England, 2 Inst. 594, 667; 4 Inst. 361; Keilway's Rep. 58 *a;* Barrington's Observations on 20 Rich. II., 34 Edw. III., 1 Hen. V.; Selden's Table Talk, Art. Gentleman; Spelman on Ancient Deeds; Sir. T. Smith de Rep., lib. i., c. 18, 19; Heywood on the Distinctions of Society among the Anglo-Saxons; Millar on Ranks; Verstegan's Decayed Intelligence, c. 10; Camden's Britannia "on the Degrees in England," p. 234, and the Glossarists.)

the Law of England, in the case just now discussed by you, is better accommodated for England than the Civil Law, is out of dispute; and we can not have the least inclination to introduce the Civil Law instead of it: but this superior excellence of the Law of England does not happen through any blameable defect in the *other law*; but, as you say, the wealth and populousness of the country are the cause.[1]

[1] The most zealous admirer of the trial by Jury must admit, that on numerous occasions it is found to be a partial or an incompetent tribunal. Yet it would perhaps be impossible by any other form of procedure to render the decision of judicial questions, subject, in a less degree, to the influence of prejudice or bias: it frequently also happens, that a Jury is better qualified, than any other description of persons, to determine the matter submitted to its consideration. But if it were a valid objection to the relaxing of the rules of evidence established in our Courts, that Juries do not ordinarily possess that capacity and discrimination, which a more liberal admission of proof would render indispensable: it can not be denied, that the policy of the State might devise some institution which in this respect would be more competent for the eliciting of truth. Still a prudent legislator would pause before he ventured, in any case, upon removing the decision of causes out of the hands of the people. It is a peculiar feature in the English Constitution, that what in other States is the work of Government, amongst us is done by the nation. It would be impolitic to make any infraction upon this principle, which should operate to take away from the mass of the people the performance of those duties, the discharging of which, independent of its primary object, the investigation of facts, is found productive of inestimable consequences both moral and political. In prosecutions instituted by the Government of the country, the trial by Jury will always be upheld on account of the protection

CHAP. XXXI.—*Whether the Proceeding by Jury be repugnant to the Law of God, or not.*

BUT, *my good Chancellor*, though the method whereby the Laws of England sift out the truth, in matters which are at issue, highly pleases me; yet there rests one doubt with me, whether it be not repugnant to Scripture: Our blessed Saviour says to the Pharisees (St. John viii. 17), "It is written in your law that the testimony of two men is true." And, in confirmation, he subjoins in the very next verse, "I am one that bear witness of myself, and the Father that sent me beareth witness of me." The Pharisees were Jews; wherefore it is the same thing to say, "It is written in your law," as to say, "It is written in the Law

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it affords to individuals, in an unequal contest with the authority of the State: In the most perilous and arbitrary times, it has proved a safeguard to the subject: The verdict of the Jury which acquitted Lilburne, is said, by Clarendon, to have occasioned more regret to Cromwell than the loss of a battle: The acquittal of the Seven Bishops animated the dispositions of the nation to a successful effort for shaking off the yoke of the Stuarts. The nature of that security, which at such times the trial by Jury is peculiarly calculated to give to the subject, is luminously explained by Prynne in his Protest for Sir J. Maynard. Sir E. Coke, in several parts of his Institutes, takes occasion to admonish his readers against all infringements on the "ordinary and precious trial per legem terræ" from the example of the proceedings of Empson and Dudley: These "bold men, and regardless of fame," were conspicuous for their attempt to introduce absolute and partial trials by *discretion:* they paid, however, the penalty of their guilt by an ignominious death; and they have been consigned to perpetual obloquy, by the immortal historian of the times.

of Moses," which was no other than the Law of God, given by Moses to the children of Israel; wherefore to contradict this Law of Moses, is, in effect, the same as to contradict the Law of God; from whence it follows, that the Law of England deviates from this Law of God, which it does not seem lawful in any wise to impugn. It is written also (Matt. xviii. 16) that our Saviour, speaking of offences, and forgiving one another, amongst other things, delivers himself thus: "If thy brother will not hear thee, then take with thee one or two more, that, in the mouth of two or three witnesses, every word may be established." Now, if in the mouth of two or three witnesses, God will establish every word, why do we look for the truth in dubious cases, from the evidence of more than two or three witnesses. No one can lay better or other foundation than our Lord hath laid. This is what, in some measure, makes me hesitate concerning the proceedings according to the Laws of England, in matters of proof, wherefore I desire your answer to this objection.[1]

[1] Sir. M. Hale, in his Tract on the amendment of the law, considers the applicability of the Mosaic Dispensation to the existing circumstances of the world: his work contains many sensible observations upon the subject discussed in the present chapter. The Puritans went the length of insisting, that the judicial laws of Moses, for the punishment of offences, ought to be observed: The necessity believed to be imposed by the Law of God, for proving an offence by two witnesses, has frequently been the subject of argument, in judicial proceedings. (Cases of Vaughan, Sir J. Fenwick, Bishop Atterbury, St. Tr.; Reniger *v.* Fogossa, Plowden's Comm. 8; Shotter *v.* Friend, Carthew, 142; and see 3 Inst. 26; also, Mosaicarum et Romanarum legum vetus collatio, cum notis Pithæi.)

CHAP. XXXII.—*The Chancellor's Answer.*

Chancellor. The Laws of England, Sir! *do not contradict these passages of Scripture* for which you seem to be so concerned; though they pursue a method somewhat different in coming at, and discovering the truth: how does that law of a *general council* prejudice or condemn the testimony of two witnesses, whereby it is provided, that the Cardinals shall not be convicted of any crime, unless upon the deposition of twelve witnesses? If the testimony of two be true, *a fortiori*, the testimony of twelve ought rather to be presumed to be so. The rule of law says, "the more always contains in it that which is less." So, the repayment of whatsoever the host spent more than the two-pence, towards the taking care of the man who fell amongst thieves, was promised to be paid punctually to him by the good Samaritan, when he came again. Shall not an impeached person, who endeavours to prove himself to have been in another place at the time of the fact alleged and committed, be obliged to produce more than two or three witnesses, when the prosecutor has proved, or is ready to prove the charge by as many. So that person who takes upon him to convict any number of witnesses of perjury, must of necessity produce a greater number of witnesses against them; so that the testimony of only two or three witnesses shall not, in all cases, be presumed to be true. *But, the meaning of the law is this*, that a less number than two witnesses shall not be admitted as sufficient to decide the truth in doubtful cases. And this appears from Bernard,[1]

[1] Bernardus Parmensis, A. D. 1250. See Decretales Gregorii Papæ ix., lib. ii., tit. xx.; De Testibus et Attestationibus, cap. xxiii., p. 717, ed. 1584, Venetiis.

(Extra. de Testi., cap. *Licet* in Glossa ordinaria,) where he puts many cases, in which, by the laws, more than three witnesses are required; in some cases, *five*, in others *seven*. And, that the truth in some cases may be proved *by two witnesses only*, when there is no other way of discovering it, is what the laws of England likewise affirm. As, where facts are committed upon the *high sea*, without the body of any county, which may be afterwards brought to trial before the Admirality-Court; facts of this kind, by the Constitution of England, are to be proved by *witnesses*, without a *Jury*.[1] In like manner are proceedings before the Lord

[1] The first case in our law, extant, relating to the marine jurisdiction, is in the time of Edward I.: but the judicial power of the Admiral does not appear to have excited the attention of the Legislature, until the reign of Richard II., when his authority was defined. The Common Lawyers formerly regarded the proceedings in the Court of Admiralty with a jealous eye: In the reign of James, formal articles of complaint were presented against the Judges, for the purpose of restraining them in their practice of granting prohibitions: to these the Judges replied in writing, justifying the grounds upon which they proceeded: in the course of the discussion the authority of Fortescue in the text, is appealed to: the part of the Institutes in which the argument concerning the Admiralty is related, has been animadverted on by Prynne, in a manner exhibiting the extraordinary stores of his erudition. (Prynne's Animadversions, p. 75; 4 Inst. c. 22, Articuli Admiralitatis.) In the reign of Charles II., the jurisdiction of the Court of Admiralty again became the subject of contention, and there is preserved an able argument delivered by Sir L. Jenkins before the Lords on that occasion. (Wynne's Life of Sir L. Jenkins, p. 76.) Some interesting particulars respecting this Court, will be found in the following authorities. (Spelman's Treatise on the Jurisdiction of the Admiralty, Selden's Mare

Constable, and Earl Marshal, upon a fact committed in another kingdom, so as the cognizance of it belong to the jurisdiction of the Court of Chivalry.[1] So, in the Courts

Clausum, Cases of the Admiralty, 12 Rep., Harl. Misc., Vol. VIII., p. 371; Luder's Tract on the Laws of Orleron; Zouch's Admiralty Jurisdiction; Nicholson's Historical Library, Part III.; 4 Inst. 124, where the Admiral is called by Coke, the English Neptune; Reeves's History of the Law, Rich. II.; Selden's Notes to Fortescue.)

[1] In arbitrary times the Court of Chivalry from the circumstance of its proceeding not being controlled by the presence of a Jury, has been deemed a suitable instrument for the oppression of the people. (See the 26th Article of the Charges preferred against King Richard II., Hayward, p. 201; also, Rot. Parl., 5 Henry IV., Vol. III., p. 530; Hallam, Vol. II., p. 360.) In the time of Charles I., it is represented as giving more damages for words, not actionable, in two days than all the Juries in all the Courts of Westminster Hall, during the term and the sittings after. (Clarendon's Life.) Mr. Hume has adduced the patent of High Constable, granted to Earl Rivers by Edward IV., to prove the arbitrary nature of that office; but Coke pronounces this to have been a most irregular precedent. (4 Inst. 127, and see further on this Patent, Hallam's Middle Ages, Vol. II., p. 361; Brodie's Introduction, p. 227; and see ibid. respecting a Statute of Edw. VI., cited by Hume on this Subject.) After the attainder of the Duke of Buckingham, in the reign of Henry VIII., by which the office of Lord High Constable became forfeited to the King, the authority and charge of it were deemed too ample to be intrusted to a subject. Cardinal Wolsey was desirous of filling this office, but was thwarted in his attempt, by the patriotic resistance of Sir T. More. It has been a controverted question, whether during the vacancy of the office of constable, the jurisdiction incident to the Court of Chivalry, can be exercised by the Earl Marshal alone. (See the Authorities collected, Hargr. Co. Litt.

of certain liberties in England, where they proceed by the Law of Merchants, touching contracts between *merchant* and *merchant*, beyond the seas, the proof is by *witnesses* only :[1] because in such like cases, there is not of the neigh-

74 *b*., n. 1.) The earliest notice of the authority of the Court of Chivalry is in the reign of Edward III.; its powers were first defined in that of Richard II. The Statute 1 Henry IV., c. 14, contains a provision, the effect of which was to prevent the determination of any matter in the Court of Chivalry, which could be tried at Common Law. Whilst the Crown was in possession of territories on the continent, there was great employment for this Court: but the necessity of resorting to it was in some measure diminished by means of a fiction, devised in the time of Edw. III., to make matters arising abroad, cognizable by a Jury from an English county: and its criminal jurisdiction was rendered less necessary, by the Statute of Henry VIII., for trying treasons committed beyond sea. (A variety of Particulars respecting the Authority of this Court, and the manner of its Proceedings, will be found in the following References: Reeves's History of the Law, Edw. III., Rich. II.; Lambard's Archeion, p. 51; 4 Inst. 123; several Tracts in Hearne's Discourses; Selden de Comite Mareschalli; Runnington's Hale on the Common Law, p. 39, 40 *a.;* Madox's Exchequer, p. 27; Selm. Gloss. Voc. Constabularius, Cotton's Posthuma, p. 64; Harg. St. Tr., Vol. XI., p. 124; Hargr. Co. Litt. 74 *b*., n. 1. There is no Record of Cases in the Court of Chivalry; Rushworth, who had kept an account of them, lost his Notes, by lending them to a person who never returned them.)

[1] A variety of particulars respecting the operation of the Law Merchant, and the course of proceedings in the Court of the Mayor of the Staple, are collected in a chapter of the fourth Institute: and much information upon the subject will be found in Prynne's Animadversions. It was enacted by the Statute 36 Edw. III., c. 7, that Merchant Strangers might either sue before

bourhood a number sufficient to make up a *Jury* of twelve men: as in contracts and other cases arising within the kingdom is usually done. In like manner if a *deed*, in which witnesses are named, be brought into the Courts of law, process shall go out against such *witnesses*, who, together with a *Jury*, shall enquire upon their oaths, whether it be the deed of that party, whose it is supposed to be.[1]

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the Mayor of the Staple, or at Common Law. The proceedings in a particular cause, which was tried according to the Law Merchant, in the reign of Edw. II., are thus related by Selden: "John Combton brings Debt *secundum Legem Mercatoriam* upon a Tally, against another Merchant, and tenders Suit by Two Witnesses: The Defendant Wages his Law, but the Judgment is thus by Ornesby pronounced. *John de Combton Marchand port un brief ciens vers un Rauf Marchand et demande VI. Marks par un Justicies forme selon la ley Marchand* (it had been commenced by Justicies, and came out of the common pleas into the Eire) *et ad mis avant un taille la quelle il tender a prover per II, s, per Richard et par Geffrey que esteyent al blee mesurer* (the debt was due for Corne) *et al liberer, mes aous per vostre ley vous voudres coverer la quele cest cort en ceo cas ne voet my resceiver et refuses la prove que il vous tend selon ley Marchand et selon la nature de sun briefe, per que agard cest court que John rescovere sa Debt vers vous come vers non defendu et ses dammages de cent sous.* (Selden ad Fortescue: and see Bracton 334 *a.*, 444 *a.*; on the Pipowder Court, Barrington's Observations on 17 Edw. IV.)

[1] Whenever the witnesses of a deed were joined with the Jurors, they so far differed from the panel, that they could not be challenged, nor was their concurrence necessary to complete the verdict. It was a rule, that the Jurors should be exempt from attaint, if the witnesses agreed with them; but if they dissented, the Jurors were liable as in other cases. (Reeves's History of the English Law, Edw. III. See further as to these Witnesses, 2

Wherefore, the law of England does not call in question any other law which finds out the truth by witnesses, especially when the necessity of the case so requires. The Laws of England observe a like method, not only in the cases already put, but in some others, which it is not material now to enlarge upon: but it never decides a cause *only* by witnesses, when it can be decided by a *Jury* of twelve men, the best and most effectual method for the trial of the truth; and, in which respect, no other laws can compare with it. This proceeding is less liable to the hazard of bribery, subornation, or other sinister methods; *neither can this method* of proceeding in any case miscarry *for want of evidence:* what the witnesses give in upon oath can not but have its due effect: neither can a *Jury* be perjured, but that for such a crime they must expect a very severe punishment, and the party thereby aggrieved is, and will be entitled to his remedy. These things are not transacted at the will and pleasure of strangers, or parties wholly unknown, but upon the oaths of honest, considerable and creditable men, who value their character, who are neighbours to the parties concerned, to whom there can be no cause of challenge or distrust as touching the *verdict* they

Inst. 448, 662; 3 Inst. 112, 130.) The vexatious delay which was sometimes occasioned by fraudulently keeping the witnesses from appearing, was the subject of legislative redress, in the reigns of Edw. II. and Edw. III. (Reeve's History, Edw. II., Edw. II.I; Barrington's Observations of 12 Edw. II., St. 1); and this abuse gradually led to the abolition of the practice of summoning them. The clause of "his testibus," in the deeds of subjects, continued until, and in the reign of Hen. VIII. (Co. Litt. 6 *a.;* 2 Inst. 78.) Many curious particulars concerning the witnesses to deeds, are to be found in Hickes's Dissertatory Epistle; Spelman on Ancient Deeds, Madox's Formulare Anglicanum.

shall give in. Oh! what detestable villanies often happen from the method of proceedings by *witnesses only*. If a man contract matrimony in a clandestine manner, and afterwards before witnesses, betroth himself to another woman. In this case the Contentious Court will oblige him to consummate with this last woman; and the Penitential Court will adjudge him to cohabit with the first, if he be duly required thereto; and he will be obliged to do *penance* every time he shall be informed against for cohabiting with the other woman, to whom he was so betrothed; nay, though in both courts, one and the same man be the Judge. May one not say in the case before us, as it is written concerning the Behemoth, (Job xl. 17), that indeed it is very intricate and perplexed. The person contrac ing shall never afterwards cohabit with either of the women, or with any woman, without being prosecuted for so doing. A mischief of this kind can not possibly happen in any case, according to the proceedings of the Law of England, though a Benemoth himself were solicitor in the cause. Are you now convinced, most excellent Prince, that the more objections you raise against the Laws of England, the more amiable and resplendent they appear.[1]

[1] It may not be irrelevant in this place to notice those parliamentary proceedings of a judicial nature, which have superseded, in particular instances, the trial by Jury. Such are Impeachments, Bills of Pains and Penalties, and Bills of Attainder.

In examining the jurisdiction of the House of Lords, in matters of judicature, it is necessary to bear in mind, that the Peers formerly sat in two distinct capacities. One, as the assemblage of the Lords Spiritual and temporal of the kingdom: the other, as the Magnum Conslium, composed of the Lords in Parliament in conjunction with the Consilium Regis: that, however, about

Chap. XXXIII.—*The Prince asks the Reason why some of our Kings have taken Disgust at the Laws of England.*

Prince. I am convinced that the Laws of England emigently excel, beyond the laws of all other countries, in the

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the time of Richard II., the authority of the assistants to the Lords, while sitting in council, dwindled away. In their first capacity the Peers tried their own members for treason, misprision of treason, and felony: in the last, they received petitions upon matters of all kinds, civil as well as criminal. The exercise of their jurisdiction, which resulted from the functions of the Magnum Consilium, was very much curtailed by several Statutes, particularly by the Act of 1 Henry IV. From this origin, the present authority of the Lords, in matters of judicature arose, and its proper boundaries have since been limited and defined, not without producing differences between several branches of the Legislature, which created serious impediments to their proceedings. In the progress of these disputes, the power of accusation before the Peers, on the behalf of the King, was acknowledged to be illegal, on the occasion of the celebrated case of Lord Kimbolton: and the presentment of articles by Lords appellant, was adjudged contrary to law, in the instance of the proceedings commenced by the Earl of Bristol against the Earl of Clarendon. One kind of judicial proceeding, as ancient, at least, as the time of Edward III., that of impeachment before the Peers by the Commons, in the character of the Grand Inquest of the nation, has been universally acknowledged to be unrestrained by any Statute, made to confine the jurisdiction of the Council or of the House of Lords. The use, however, of this mode of prosecution was suspended, on account of the preference given to the proceeding by Bills of Attainder, or by information in the Star Chamber during the reign of Edward IV. and those of the succeeding Princes, till

case you have been now endeavouring to explain; and yet I have heard that some of my ancestors, kings of England,

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the middle of the reign of James. In later times, several important circumstances connected with parliamentary impeachments. have been made the subject of learned enquiry and debate, and in some instances the law in respect of them, has been declared by the Legislature. Of this description is the King's power of pardoning, with a view to determine an impeachment; the necessity of a High Steward being appointed to preside at the trial; the revival of an impeachment after a dissolution of Parliament; its effect in suspending the proceedings of inferior Courts upon the same charge; the liability of Commoners to this species of trial in capital cases; the right of the Bishops to vote upon preliminary points; together with many other questions relative to the order of proceedings; the commitment of the person accused; and the power of liberating him on bail. The events which have given rise to these discussions are some of the most interesting, that the domestic history of the country records.

With respect to Bills of Attainder, and of Pains and Penalties, it appears, that the right of the Commons to participate in the judgments of the Lords was negatived, in a solemn manner, in the reign of Henry IV.; a circumstance which forms a prominent feature in subsequent discussions concerning the judicature of Parliament: and there appears to have been no attempt on the part of the Commons, either during that or the two succeeding reigns, to revive their claim. However, in the reign of Edward IV. it was deemed expedient to submit the proceedings against the Duke of Clarence to the consideration of the House of Commons: and in the time of Richard III. and the following reigns, there are no judgments by the Lords alone. Bills of Attainder were multiplied to an appalling extent in the reign of Henry VIII. That sanguinary monarch was instructed by Cromwell, Earl of Essex, that an attainder would stand good in law, although the accused were never allowed to be heard in vindication of his

have been so far from being pleased with those laws, that

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innocence: a doctrine which proved as fatal to himself, as it was pernicious to his country. Of the manner of which proceeding Sir E. Coke has said, "Auferat oblivio, si potest, si non, utcunque silentium tegat."

The power of impeachment has been designated by Mr. Lechmere, as a privilege belonging to the Commons, at least as valuable as that of giving money, which belongs solely to them. It has justly been deemed a most important right in the frame of the English Constitution, for the punishment of offences of a nature affecting the public interest, in cases within the jurisdiction of the Courts of Westminster Hall; but where the description of the offence is such as a jury is incompetent to decide upon, or where the offender is, by his station, raised above the apprehension of danger from a prosecution carried on in the ordinary course of justice. To which some writers have added another ground: where the delinquency is not punishable according to the law, as administered in the inferior Courts. It would, indeed, have been a mockery of a judicial proceeding, to have directed a Jury to decide upon a misdemeanor in office depending upon the propriety of the Partition Treaty, or that of Utrecht; or to determine what was a libel on the Revolution: and the united accusation of the Commons of England, by their representatives in Parliament, will appear necessary for dragging to justice such powerful favorites of royalty as Buckingham, Strafford, and Danby; or persons of such exalted station as Lord Bacon and Lord Macclesfield. In all which cases, the offences and the offender were within the jurisdiction of the ordinary Courts, yet the trial of them by the common method of a Jury could never be satisfactory to the public. But to determine an offence to be treason, because the party is impeached, which is not a treason declared in the Statute of Edward III.; or to pronounce that to be a misdemeanor, which no Judge sitting in Westminster Hall would allow to be one, is surely incompatible with the security

they have been industrious to introduce, and make the Civil

which every individual is entitled to enjoy, so long as he transgresses no established law. Locke, in his Treatise on Government, has appropriated a chapter for the purpose of explaining the limits of that trust, which the people confide to the legislative authority of a country. He says, that it can not assume to itself a power to rule by extemporary arbitrary decrees; but is bound to dispense justice, and to decide the rights of the subject, by promulgated standing laws. The national trust has been too frequently abused, by new designations of crime invented by the instigators of those judicial proceedings, in which the two Houses of Parliament have concurred: but if a similar course were ever again to be pursued, it is to be hoped that ourselves and our posterity will evince, by a temperate but inflexible resistance, the truth of the opinion which the great Lord Bacon formed of the English people, that they continue to have deeply engraven in their hearts the sentiment, "Nolumus leges Angliæ mutari." In the application of this transcendent remedy for the evils occasioned by flagrant misconduct in the State, it will always be recollected that the hardships which the mode of trial by impeachment imposes on the individual accused, are numerous and severe. Not to dwell upon the advantages which are allowed to the conductors of the prosecution, by the course of proceedings, greater than those which are permitted in ordinary cases, it is no trivial deprivation, if the prisoner be a commoner, to be obliged to relinquish his right of challenge, and to await the issue of a trial in which his Judges are not his Peers. Neither ought it to be forgotten that the proceeding by impeachment was formerly, in some cases, imperatively called for, where the necessity of it, would not, in the present day, be thought so indispensable, from the independent character which Judges have assumed since the alteration of their patents; unless, indeed, the practice of raising Judges to higher stations upon the Bench, be considered as affording to the Crown a means of influencing their minds almost

as objectionable as the ancient power of displacing them. The history of impeachments in this country, and the principles of human nature, may likewise induce an opinion, that in judicial matters, a numerous assembly, of which many of the members are closely connected by domestic or political ties, is a tribunal very incompetent for the formation of an unbiased and dispassionate judgment.

When the same reasons exist for the interference of Parliament, as would justify the proceeding by impeachment; but the accused flies from justice, and does not surrender himself by a time appointed; or is in actual rebellion, and in direct opposition to all methods of trial, and in defiance of every tribunal of law, Bills of Attainder or of Pains and Penalties, have been not unfrequently restored to. On the first ground, the Bill which passed against Lord Clarendon, and that which was preparing against Lord Danby during his concealment, have been defended. On the latter principle, the attainders of Monmouth and of the Pretender may be justified. Several cases will be found in Mr. Hatsell's collections, where the extraordinary emergence of the occasion, or other public considerations, may be thought to point out the proceeding by Bill, as a preferable course to that of a prosecution by the Commons. But where the remedy by impeachment is available, Bills of Attainder and of Pains and Penalties will be regarded with jealousy, on account of the dangerous license which the Houses of Parliament have permitted to themselves, from the mixed and indefinite nature of their legislative and judicial capacities when united. The cases of Lord Strafford and Sir J. Fenwick deserve particular attention, because these precedents have been defended by arguments replete with constitutional learning and ingenuity of talent: but the impartial reader, after a mature reflection upon them, will probably conclude by expressing his reprobation of the principles on which they proceeded; subversive as they are of all settled notions respecting

Law: this makes me wonder what they could intend by such behaviour.[1]

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the nature of offences, and of the evidence by which criminal charges ought to be established. The protest of the Lords, upon the occasion of the Bill for inflicting penalties upon Bishop Atterbury, will be read for the valuable opinions it contains upon this branch of Constitutional Law: a subject of paramount importance, in the opinion of every person who assents to the observation of Sir E. Coke, that it is the first duty of Parliament, to set an example of justice to inferior Courts.

[1] Selden, in his Dissertation upon Fleta, asks, what Kings of England ever desired to introduce the laws of Rome into this country; and he mentions, as evincing a contrary disposition in our Sovereigns, the edict of Stephen against the laws of Italy, and a protestation in the Parliament of the 11th Richard II., by the King and Lords, that the Imperial Laws had no force in England: Coke, on the other hand, enlarges on the attempts to bring in the Civil Law, in the reign of Henry VI. (3 Inst. 35.) The subject is particularly considered in Hurd's Dialogues upon the Constitution, and in Sullivan's Lectures. These writers mention the protection afforded to the Civil Law by Edward I., who brought over to England the celebrated Accursius, and established him in a school at Oxford. They advert to the open patronage of the Civil Law, and the profession of its principles by Richard II. And they notice the institution of professorships of Civil Law in the Universities, and the observation of it, in the proceedings of those Courts which were immediately under the King's influence, as indicative of the sense, not of this or that King, but of a whole succession of Princes. At a later period, it was one of the articles prepared against Cardinal Wolsey, that he endeavoured to subvert, "Antiquissimas leges hujus regni, universumque hoc regnum legibus Imperialibus subjicere." Laud obtained of Charles I. that the Masters of the Requests should be all Doctors

CHAP. XXXIV.—*The Chancellor's Answer.*

Chancellor. You would cease to wonder, my Prince, if you would please seriously to consider the nature and occasion of the attempt. I have already given you to understand that there is a very noted sentence, a favourite maxim, or rule in the Civil Law, that, "That which pleases the Prince has the effect of a Law."[1] The Laws of England

of the Civil Law, and also eight Masters of Chancery. (Straff. Lett. and Disp., Vol. I., p. 176; Clarendon's History, lib. iv.) A policy which is explained by the complainants which Strafford used to indulge against the common lawyers, that they monopolized all to be governed by their year books; and that they were in the habit of hanging their noses over the flowers of the Crown, and of blowing and snuffling upon them, till they had taken both scent and beauty off them. (Strafford's Lett. and Disp., Vol. I., pp. 130, 201.) The known partiality of King James for the professors of the Civil Law is supposed to have been the cause of his extraordinary admiration of the play of Ignoramus, composed in ridicule of the practice of the Common Law. (The Case and Argument against Sir Ignoramus, by Callis; and see the References in Hawkins's Ignoramus)

[1] "Quod Principi placet, legis habet vigorem." The entire passage, as translated from the Institutes of Justinian by Gibbon, is this: "The pleasure of the Emperor has the vigor and effect of the law, since the Roman people, by the Royal Law, have transferred to the Prince the full extent of their own power and sovereignity." A fragment in copper of the Lex Regia which was passed by the Roman people in favor of Vespasian has been preserved; but there can not be collected from it any expressions to warrant the law in the extraordinary terms in which it is stated in the Institute. (Gruter's Inscriptions.) The passage in the text is attributed, in the compilation of Justinian, to the lawyer

admit of no such maxim, or any thing like it. A King of England does not bear such a sway over his subjects, as a King *merely*, but in a *mixed political capacity:* he is

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Ulpian. But the avowal which has been made, by the persons engaged in the formation of that great work, destroys the credit to be attached to the authorities they cite. "Nomina quidem veteribus servavimus, legum autem veritatem nostram fecimus: Itaque si quid erat in illis seditiosum, multa autem talia erant ibi reposita, hoc decisum est et definitum." The manner in which the passage from the Roman Law in the text is cited and explained by our ancient writers, Bracton, Fleta and Thornton, is the most singular circumstance contained in their works. They have had recourse to an absolute forgery upon the Institutes of Justinian, for the purpose of giving an interpretation to it consistent with the existence of rational liberty. Selden expresses himself overwhelmed with astonishment at the method in which they have avoided its obvious import, at the same time treating it as a part of the Law of England. (Diss. ad Fletam, Hurd's Dialogue on the Constitution.) It is to be observed, that some of the most distinguished commentators of the Civil Law have considered that the terms of the Lex Regia did not confer an absolute authority on the Prince. (Heineccius's Antiq., lib. i., tit. 2, c. 66; Duck de ortu et progressu juris civilis, lib. i., c. 3; Halifax's Introduction to his Analysis; Taylor's Civil Law, p. 140.) But that the jealousy entertained of this law by Fortescue was well founded, is confirmed by some particulars which Lord Lyttleton relates in his History of Henry II., respecting a controversy on the construction to be given to the passage in the text, which occurred in the dominions of the Emperor Frederick Barbarossa: and which terminated in a declaration, that to entertain doubts of the Roman Emperor being the absolute master of the whole world and of all the goods of individuals, so that he might dispose of them at his pleasure, was a heresy.

obliged by his Coronation Oath[1] to the observance of the laws, which some of our kings have not been well able to digest,

[1] An Oath has been required from the Sovereigns of this country, at their Coronation, from the earliest times to which our historical information extends. The form of the Coronation Oath administered to a Saxon King is preserved. (Hickes's Institutiones Grammaticæ Anglosaxonicæ.) The Conqueror appears to have taken oaths on two several occasions, obliging him to maintain the ancient laws of the country. (Hoveden Pars Prior, p. 258; Malmesb. de Quest. Pontif., p. 154 *b.;* Mat. Paris in vitâ Freth. Abbatis, fol. 48; and see for the more ancient Oaths, Mirror of Justices, c. 1, sect. 2; Bracton, lib. iii., c. 9. The Oath in Bracton implies an Obligation not wantonly to molest Foreign Nations, Barr. on 2 Edw. III. n.) King Henry VIII. corrected the Coronation Oath with his own hand. (Book of Oaths, A. D. 1689.) In the time of Charles I. a serious charge was made against the King and Laud for altering the Oath by striking out the words "quas vulgus elegerit," and inserting these, "agreeable to the King's prerogative." (Heylin's Cyprianus Anglicus, p. 141 et. seq.; Milton's Iconoclastes, sec. 6; Defensio Pro. Pop. Angl., c. 8; Prynne's Canterbury's Doom, p. 69; Whitelock's Mem, 84 *b.;* Brog. Brit. Art. Laud. And see the arguments collected, Harris's Life of Charles I., p. 198 n.) A similar accusation has been brought against James II. (Sir R. Atkyns's Tracts, p. 413.) The Coronation Oath was changed at the Revolution, because, as the Statute alleges, it had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at that time unknown. (St. 1 W. and M., c. 6; and see Debate on Coronation Oath, Vol. V. Parl. Hist.) Some very important questions have arisen respecting the interpretation of several passages in the Coronation Oath. As, in the time of Charles I., whether the King was bound to give his assent to whatever laws the Parliament had previously agreed on: a discussion which embraced the constitutional topic of the independency of the respective branches

because thereby they are deprived of that free exercise of dominion over their subjects, in that full extensive manner,

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of the Legislature. (Clarendon's History, Book V., pp. 452, 483; May, p. 128; Oldcastle's Remarks, Letter 7; Burke's Thoughts on the present Discontents; Debates, Tem. Will. III., respecting the Exercise of the Veto, Parl. Hist., Vol. V.) Another point respecting the construction of the Coronation Oath was canvassed in the reign of the same King; whether the Sovereign was bound by the terms of his oath to resist any change in the established religion, although sanctioned by the national consent, and approved of by his own judgment. (2 Neale's History of the Puritans, p. 229 et seq., the Argument between Charles I and Henderson upon the Subject.) A difficulty was felt by William III. upon the same ground, who conceived that the language of the Oath, in the terms in which it was framed, was inconsistent with his views of religious toleration. In the present day it has been contended, that a King of England would be prohibited by his Coronation Oath, from giving an ear to the claims of the Roman Catholics, although his own conviction and the voice of the nation conspired to advocate them. Such scruples seem to indicate in the minds of the persons entertaining them the most derogatory conceptions of the Divine Attributes: but a king, who honestly felt himself under the influence of these bigoted impressions, would be solicitous to abdicate his throne, rather than they should stand an impediment to the completion of the vows of his people. Foster, in his discourse upon High Treason, censures the expressions of some writers of eminence, who have spoken of the ceremony of Coronation as a bare notification of the descent of the Crown. (Foster, p. 189; 3 Inst. 7; 1 Hale P. C. 61, 101.) In ancient times it was considered a solemnity of great importance: Not to dwell upon the extraordinary proceedings against Thorpe in the reign of Edward III., who was condemned to be hanged because he was found "Sacramentum Domini Regis fregisse." (3 Inst. 223.) Several facts are collected by Mr. Hal-

as *those kings* have, *who* preside and govern by an *absolute regal power;* who, in pursuance of the laws of their respective kingdoms, in particular the Civil Law, and of the aforesaid *maxim*, govern their subjects, change laws, enact new ones, inflict punishments, and impose taxes, at their mere will and pleasure, and determine suits at law in such manner, when, and as they think fit. For which reason *your ancestors* endeavoured to shake off this *political* frame of government, in order to exercise the same absolute regal dominion too over their subjects, or rather to be at their full swing to act as they list: not considering that the power of both kings is really and in effect equal, as is set forth in my aforesaid treatise, *de Natura Legis Naturæ*, viz., that it is not a restraint, but rather a liberty to govern a people by the just regularity of a *political* government, or rather right reason; that it is the greatest security both to king and people, and takes off no inconsiderable part of his royal care. That this may the better appear, you will please to consult the experience you have had of both kinds of government; to begin with the *regal*, such as the king of France exercises *at present* over his subjects; and, in the

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lam from early English History, tending to shew that the ceremony of the Coronation gave a right, as it were, by seisin, to the throne. The taking of the Coronation Oath does, in a slight degree, countenance the hypothesis of an original compact. (See this subject considered in Mr. Bentham's Fragment on Government, p. 42 et. seq. For the Forms of the Coronation Oaths at different periods, Matt. Paris, p. 153; Rapin, Edw. II., Rich. II.; Report of the Lords' Committees respecting the Peerage, p. 230; Prynne's Signal Loyalty; 1 Bl. Comm., p. 235 n.; the Book of Oaths, published A. D. 1689; Strutt's Antiq., Vol. II., p. 55 et seq.)

next place, you will please to consider the effect of that *regal political government* which kings of England exercise over their subjects.

CHAP. XXXV.—*The Inconveniencies which happen in France by Means of Absolute Regal Government.*

YOU may remember, most worthy Prince, in what a condition you observed the villages and towns of France to be, during the time you sojourned there. Though they were well supplied with all the fruits of the earth, yet they were so much oppressed by the king's troops, and their horses, that you could scarce be accommodated, in your travels, not even in the great towns: where, as you were informed by the inhabitants, the soldiers, though quartered in the same village a month or two, yet they neither did nor would pay any thing for themselves or horses; and, what is still worse, the inhabitants of the villages and towns where they came, were forced to provide for them *gratis*, wines, flesh, and whatever else they had occasion for; and if they did not like what they found, the inhabitants were obliged to supply them with better from the neighbouring villages: upon any non-compliance, the soldiers treated them at such a barbarous rate, that they were quickly necessitated to gratify them. When provisions, fuel and horse meat fell short in one village, they marched away full speed to the next; wasting it in like manner. They usurp and claim the same privilege and custom not to pay a penny for necessaries, either for themselves or women (whom they always carry with them in great numbers), such as shoes, stockings, and other wearing apparel, even to the smallest trifle of a lace, or point; all the inhabitants, wherever the

soldiers quarter, are liable to this cruel oppressive treatment: it is the same throughout all the villages and towns in the kingdom, which are not walled. There is not any the least village, but what is exposed to the calamity, and once or twice in the year is sure to be plundered in this vexatious manner. Further, the king of France does not permit any one to use *salt*, but what is bought of himself, at his own arbitrary price; and, if any poor person would rather choose to eat his meat without salt, than to buy it at such an exorbitant dear rate, he is notwithstanding compellable to provide himself with salt, upon the terms aforesaid, proportionably to what shall be adjudged sufficient to subsist the number of persons he has in family: besides all this, the inhabitants of France give every year to their king the *fourth part* of all their *wines*, the growth of that year, every vintner gives the *fourth penny* of what he makes of his *wines* by sale. And all the towns and boroughs pay to the king yearly, great sums of money, which are assessed upon them for the expenses of his men at arms. So that the king's troops which are always considerable, are subsisted and paid yearly by those common people, who live in the villages, boroughs and cities. Another grievance is, every village constantly finds and maintains two *cross-bowmen* at the least; some find more, well arrayed in all their accoutrements, to serve the king in his wars, as often as he pleaseth to call them out; which is frequently done. Without any consideration had of these things, other very heavy taxes are assessed yearly upon every village within the kingdom for the king's service: neither is there ever any intermission or abatement of taxes. Exposed to these and other calamities, the *peasants* live in great hardship and misery. Their constant drink is water, neither do

they taste, throughout the year, any other liquor; unless upon some extraordinary times, or festival days. Their clothing consists of *frocks*, or little short *jerkings* made of *canvass* no better than common sackcloth; they do not wear any woollens, except of the coarsest sort; and that only in the garment under their frocks; nor do they wear any trowse, but from the knees upward; their legs being exposed and naked. The women go barefoot, except on holidays: they do not eat flesh, unless it be the fat of bacon and *that* in very small quantities, with which they make a soup: of other sorts, either boiled or roasted, they do not so much as taste, unless it be of the inwards and offals of sheep and bullocks, and the like, which are killed for the use of the better sort of people, and the merchants: for whom also quails, partridges, hares, and the like, are reserved, upon pain of the gallies: as for their poultry, the soldiers consume them, so that scarce the eggs, slight as they are, are indulged them by way of a dainty. And if it happen that a man is observed to thrive in the world, and, become rich, he is presently assessed to the king's tax, proportionably more than his poorer neighbours, whereby he is soon reduced to a level with the rest. This, or I am very much mistaken, is the present state and condition of the peasantry of France. The nobility and gentry are not so much burthened with taxes. But if any one of them be impeached for a state-crime, though by his known enemy, it is not usual to convene him before the ordinary judge, but he is very often examined in the king's own apartment, or some such private place; sometimes only by the king's pursuivants and messengers: as soon as the king, upon such information, shall adjudge him to be guilty, he is never more heard of; but immediately, with-

out any other formal process, the person so accused and adjudged guilty is put into a sack, and by night thrown into the river by the officers of the *provost-marshal*, and there drowned: in which summary way you have heard of more put to death than by any legal process. But still according to the Civil Law, "what pleases the prince has the effect of a law." Other things of a like irregular nature, or even worse, are well known to you, during your abode in France, and the adjacent countries; acted in the most detestable barbarous manner, under no colour or pretext of law than what I have already declared. To be particular would draw out our discourse into too great a length. Now it remains to consider what effect that *political mixed government*, which prevails in England, has, which some of your progenitors have endeavoured to abrogate and instead thereof to introduce the Civil Law; that, from the consideration of both, you may certainly determine with yourself which is the more eligible, since (as is above mentioned) the *philosopher* says, "that opposites laid one by the other, do more certainly appear;" or, as more to our present argument, "happiness by their contraries are best illustrated."[1]

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[1] The text will not fail to recall to the reader's recollection the remarkable speech of Sir Dudley Carleton, which incensed the House of Commons in the reign of Charles I. "That in other countries, particularly in France, they had formerly parliaments, as we have; but when their parliamentary liberty was turned into tumultuary license, and their kings found how these councils endeavoured to curb them, they took away and abolished those parliaments; and now the common people wanting good food, looked more like ghosts than men, and went in canvass clothes, and wooden shoes:" similar descriptions of the tyrannical

CHAP. XXXVI.—*The comparative Advantages in England, where the Government is of a mixed Nature, made up of the Regal and Political.*

IN England no one takes up his abode in another man's

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nature of the ancient government of France, are to be met with in many of the early writers of this country, and in the speeches in Parliament. (Sir T. More, Preface to the Utopia "stipendariis in pace quoque, si pax ista est, oppleta atque obsessa militibus;" Aylmer's Harborowe for faithful Subjects, the Marginal Reference, "How the French Pezantes be handled,"—"Amongst other grievances, they pay till their bones rattle in their skin;" Hayward's Life of Hen. IV., p. 250; D'Ewes, p. 169; Harl. Misc., Vol. V., p. 252.) These accounts are important, with reference to the question upon which Mr. Hume and Mr. Brodie are at issue, the comparative liberty enjoyed by England, and the other nations of Europe, antecedently to the reign of the Stuarts. The description given of France by Fortescue is confirmed and illustrated by the writings of the contemporary historian Comines. Louis XI., who was then king, is said to have delivered the Crown of France out of wardship. Voltaire observes, that he was the first absolute monarch in Europe, after the decline of the House of Charlemagne: the feudal government had been destroyed about the time when his predecessor, Charles VII., established his power, by the expulsion of the English, the re-union of several important provinces to the Crown, and the establishment of perpetual taxes. It is certain, that the example afforded by the arbitrary government of France, and particularly the gabelle of salt, has been cited with a view to sanction, by such a precedent, the adoption of similar courses in this country. (Strafford's Lett. and Disp., Vol. I., pp. 93, 193; Sir H. Wooton's Speech, Debates on Impositions, Tem. Jac. I.) Whilst the blessings of the English Constitution, as manifested in the prosperity of the people,

house without leave of the owner first had:[1] unless it be in *public inns*;[2] and there he is obliged to discharge his reckoning, and make full satisfaction, for what accommodations he has had, ere he be permitted to depart. Neither is it lawful to take away another man's goods without the consent of the proprietor, or being liable to be called to an account for it. No man is concluded, but that he may provide himself with *salt*, and other necessaries for his family, when, how and where he pleases. Indeed the king, by his *purveyors*,[3] may take for his own use nec-

have been the theme of admiration abroad, not only in the present day, but so early as the reign of Henry VI. (Comines, lib. v., c. 1; lib. v., c. 18.)

[1] The summary proceeding in case of forcible entries which had been appointed by a Statute of Richard II., was enlarged and rendered more effectual in the reign of Henry VI. The Paston Letters, written at this period, shew the manner in which private houses were sometimes fortified to oppose attacks, and the alarming nature of the aggressions made upon the dwellings and property of individuals. (Paston Letters, Vol. III., Letter 77; Vol. IV., Letters 58, 75, 93, 94, 95, 96, 97, 100, 103, 104, 106; Vol. V., Letters 65, 167.)

[2] In the time of Henry VI., it seems not to have been a settled point, whether an action might be maintained against an innkeeper for refusing a lodging; and it appears to have been the better opinion, that the proper remedy was to complain to the ruler of the vill, or the constables of the place. (Year Book, 39 Hen. VI., p. 18; 5 Edw. IV., p. 2.)

[3] Burke, in his speech upon economical reform, has given a lively description of the ancient practice of purveyance. And a variety of interesting particulars respecting it are collected in the Archæologia of the Antiquarian Society. (Archæol. Antiq. Soc., Vol. VIII.; and see Barrington on 28 Edw. I., 10 Edw. III., 36

essaries for his household, at a reasonable price, to be assessed at the discretion of the *constables* of the place,

Edw. III.; Ellis's Original Letters, Vol. I., p. 239; on the Impressment of Artificers, Hallam's Middle Ages, Vol. II., p. 358; of Choristers, Jehu Webb's Case, 8 Rep.) The abuses to which the system of purveyance gave rise in this country are eloquently set forth by Lord Bacon, in delivering an address, presented to King James from the House of Commons. He says, that there was no grievance in the kingdom so general, so continual, so sensible, so bitter upon the common subject, as that. (Bacon's Works, Vol. II., p. 150; and see respecting the Exercise of the Prerogative of Purveyance, by the Tudors, Hume, note EE to Vol. VI.; Brodie's British Empire, Vol. I., p. 297.) The restraining of the excesses of the purveyors was a subject that much engaged the attention of the Legislature in former times. Coke mentions, that no less than forty-eight Statutes have been passed relative to this practice. (2 Inst. 224, 33, 35, 545, what is said concerning the Book entitled "Speculum Regis," written against Purveyors, Tem. Edw. III.; 3 Inst., c. 24, on Felony in Purveyors; 4 Inst., c. 29, the Court of Purveyors; St. 36 Edw. III., that the odious Name of Purveyor should be changed to that of Achator; Stat. 1 Henry VI., c. 2, for Proclaiming the Laws of Purveyance Four Times a Year.) Coke relates, that one of Queen Elizabeth's purveyors was hanged for offending against these laws: and some arbitrary proceedings respecting purveyance, from the substance of one of the charges preferred against Wolsey. The difficulty of procuring provisions, arising from the want of regular and well supplied markets, was often productive of serious inconveniences: The collection of Letters recently published by Mr. Ellis contains some curious facts in illustration of this: provisions are mentioned to have been sent for to Flanders, in consequence of their having been bought up at home, in expectation of a royal progress. (Ellis's Original Letters, Vol. II., p. 271.) Before the extinction of the practice of purveyance,

whether the owners will or not: but the king is obliged by the laws to make present payment, or at a day to be fixed by the great officers of the king's household. The king can not despoil the subject, without making ample satisfaction for the same:[1] He can not by himself, or his ministry, lay taxes, subsidies, or any imposition, of what kind soever, upon the subject;[2] he can not alter the laws, or make

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compositions in lieu of it had been stipulated for by most of the counties. Many arguments are urged against the policy of abolishing it, which, in the present day, will afford amusement to the reader, in a book written by Fabian Phillipps, entitled "The Antiquity, Legality, Reason, Duty, and Necessity of Purveyance and Pre-emption."

[1] Sir E. Coke, in that part of his Institutes in which he treats of the Courts of the Forests, says, that no King of England could legally have raised a free chase, park, or warren, in any of the grounds of his subjects; and in confirmation of this he mentions a remarkable indenture made between Henry VIII. and certain freeholders and copyholders, for the purpose of enabling him to create Hampton Court Chase, and yet, as Coke observes, Henry VIII. did stand as much upon his prerogative as any King of England ever did. (4 Inst. 301.) Agreeable to the same opinion is the certificate of Popham, Chief Justice, and all the Justices of England, respecting the prerogative of the King in digging for saltpetre. (3 Inst. 84.) Lord J. Russell has related two remarkable instances, in which poor men, with law on their side, overcame the pretensions of a Princess of the Blood, and of the Heir Apparent to the Throne. (Treatise on the Constitution, Append., and see Lord Chatham's Speech on General Warrants, A. D. 1764.) The resistance of Hampden, a private gentleman, to an imposition of twenty shillings, has rendered the tax of ship-money "a name of lasting sound in the history of this country."

[2] It appears from Fortescue's Book on "Absolute and Limited Monarchy," that in the time of Edward IV. the revenue of the

new ones, without the express consent of the whole kingdom in Parliament assembled: every inhabitant is at his liberty fully to use and enjoy whatever his farm produceth, the fruits of the earth, the increase of his flock, and the like: all the improvements he makes, whether by his own proper industry, or of those he retains in his service, are his own to use and enjoy without the lett, interruption, or denial of any: if he be in any wise injured, or oppressed, he shall have his *amends* and satisfaction against the party offending: hence it is, that the inhabitants are rich in gold, silver, and in all the necessaries and conveniences of life. They drink no water, unless at certain times, upon a religious score, and by way of doing penance. They are fed, in great abundance, with all sorts of flesh and fish, of which they have plenty everywhere; they are clothed throughout in good woollens; their bedding and other furniture in their houses are of wool, and that in great store; they are also well provided with all other sorts of household goods and necessary implements for husbandry: every one, according to his rank, hath all things which conduce to make life easy and happy.[1] They are not sued at law but before the or-

Crown, exclusive of parliamentary supplies, was equal to a fifth of the lay property of the kingdom. Respecting the ancient revenues of our Kings, see a Tract by Sir R. Cotton upon the subject: and the second Book of Lyttleton's Henry II., with the Notes: also the voluminous collections of Madox in his Treatise on the Exchequer. Fortescue does not state that our Kings were restricted from aliening their revenue: Lord Holt, in his argument on the Bankers' Case, draws an inference from this circumstance in support of Royal Grants.

[1] In a passage of Hollingshead, in the discourse prefixed to his History, and which some ascribe to Harrison, speaking of the

dinary judge, where they are treated with mercy and justice, according to the laws of the land; neither are they impleaded in point of property, or arraigned for any capital crime how heinous soever, but before the king's judges, and according to the laws of the land. These are the advantages consequent from that *political mixed government* which obtains in England: from hence it is plain, what the

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increase of luxury, it is said, that old men have remarked three things marvelously altered in England within their remembrance: first, in the multitude of chimneys; secondly, the amendment of lodging; thirdly, the exchange of wooden platters into pewter, and wooden spoons into silver or tin. The greater part of the buildings in the towns of England are mentioned by the same writer to consist only of timber, cast over with clay, commonly of a white, red, or blue color: the houses of the nobility, which were newly erected, were usually of brick or stone: and glass windows were beginning to be used in England. The subject in the text derives considerable illustration from the interesting poem entitled Pierce Ploughman's Vision, written in the reign of Edward III. (See particularly Pierce Ploughman's Address to Hunger; and further as to the Domestic Economy of the English People, in Early Times, Henry, Vol. V., c. 7; Hallam, Vol. II., c. 9; Strutt's Antiquities; Paston Letters, passim; Ellis's Specimens of the early English Poets, c. 13; "On the Private Life of the English in the Reign of Hen. VI.") Mr. Brodie has endeavoured to account for the decay of the ancient provincial towns in England, from the diminution of the numbers of small farmers and agriculturalists, by reason of the system of inclosures; by the demands of which description of persons he supposes the manufacturers in the provincial towns to have been principally supported: it appears, however, that till a late period, the common people were much in the habit of manufacturing their own clothes. (Brodie's Introduction, p. 36; Eden on the Poor, Vol. I., pp. 109, 121.) It was not till the middle of the seventeenth

effects of that law are in practice, which some of your ancestors, kings of England, have endeavoured to abrogate: the effects of that other law are no less apparent, which they so zealously endeavoured to introduce among us; so that you may easily distinguish them by their comparative advantages; what then could induce those kings to en-

century, that cottons were manufactured in this country, though silks had been introduced in the reign of Henry II., and furs were in common use in the time of Edward I. (Strutt's Antiq., Vol. II., p. 83; 3 Inst. 199; on the Use of Furs, Barrington on 10 Edw. III.; on the Laws against the Waste of Gold and Silver in Embroidery, Henry, Vol. V., p. 456; and upon Ancient Dresses in England, see Peck's "Desiderata Curiosa.") With respect to the agricultural instruments mentioned in the text: The Norman plough, without wheels, the handle of which was held in one hand, whilst the other directed a plough-staff to break the clods, continued in use till the seventeenth century: the harrow was known to the Normans, as appears from the Bayeux tapestry. (Strutt's Antiq., Vol. II., p. 12.) Salt is particularly mentioned by Fortescue in this chapter: a circumstance which conveys information both in respect of the manurance of the soil, and the food of the inhabitants. The first pits of fossil or rock salt known in this country, were accidentally discovered in Cheshire, so late as A. D. 1670, at the very spot where Domesday records some brine-springs. Henry VI. invited over some manufacturers of salt from Zealand. The monopoly of this article was one of those which Elizabeth recalled: in announcing which circumstance to the Parliament, Sir R. Cecil thus quaintly expressed himself, "That you may eat your meat more savory than you have done, every man shall have salt as good and cheap as he can buy it, or make it freely, without danger of that patent which shall be presently revoked." (Townsend's Journals, p. 150.)

deavour such an alteration, but only ambition, luxury, and impotent passion, which they preferred to the good of the State. You will please to consider in the next place, my good Prince, some other matters which will follow to be treated of.[1]

[1] Sir E. Coke, in his Commentary on the Statute of Marlebridge, says, the Judges are not Judges of Chambers, but of Courts; neither are causes to be heard upon petitions or suggestions, but in curiâ Domini Regis. It is alleged against Empson and Dudley, that they used to convent men before themselves at their private houses. (Bacon's Henry VII.) A similar accusation forms one of the articles against Finch, in his impeachment: Lord Falkland, who presented the charge to the House of Lords, imputed to him, that he brought all law from his Majesty's Courts into his Majesty's breast. (Parl. Hist., Vol. II.) The right of the subject to be tried by the ordinary tribunals, is asserted in very forcible language, by declarations of the Legislature, on the occasions of reversing the Attainders against the Earl of Kent, in the reign of Edward III., and against the Earl of Lancaster, in the reign of Edward IV., both of whom were executed according to Martial Law in the time of peace. (Hale's Hist. of the Common Law, p. 42; 3 Inst., p. 52.) Instances, however, are to be found of several flagrant violations of this privilege by some of our Sovereigns. (Case of the Earl of Kent, *supra;* the Proceedings against Gloucester at Nottingham Castle, in the presence of Richard II.; the Execution of a Cutpurse, by order of James, at Newark, Peyton's House of Stuart; and examine the Imputations on the Conduct of Charles I., in respect of his Treatment of the Earl of Loudon, 2 Brodie, 515.) It has been thought, that by the twenty-ninth chapter of Magna Charta, the King is prohibited from erecting any new criminal court. (Sullivan's Lectures, p. 377.) And Sir E. Coke evinces a great jealousy of all new commissions, conferring powers of judicature, which are not sanctioned by Parliament. (3 Inst. 165; 4 Inst. 162.) There is an in-

CHAP. XXXVII.—*Concerning the Regal Government and the Political Government.*

SAINT THOMAS, in the book which he addresses to the king of Cyprus (De Regimine Principum), says, "that a

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teresting case in his Reports, in which he tells us, that in conjunction with the rest of the Judges, he refused to sit upon the High Commission, in the time of James, notwithstanding the many endeavours, made by the Lord Treasurer to persuade him. The Judges of the land have often interposed a salutary check to the proceedings of those Courts, which have been founded on principles incongruous with the Common Law. (4 Inst. 332, 333; Strafford's Lett. and Disp., pp. 130, 155, 205, 173; Brodie's Introduction, pp. 199, 200; Whitelocke's Memorials, p. 15.) But such institutions have too frequently been deemed a necessary support to arbitrary power; until the discontent excited by them has spread so widely throughout the nation, as ultimately to effect the subversion of the Government, by which they were upheld. (See Observations on the Star Chamber, and other Summary Tribunals, in the Minutes of Lord Somers's Speech on the Bill for Abolishing the Privy Council of Scotland, Hardw. St. Papers, Vol. II., p. 473; on the Court at York, Rushworth, Vol. II., p. 158; Life of Clarendon, 4 Inst., c. 49; on the Court of the Marches, Bacon's Works, Vol. IV., concerning Cromwell's High Court of Justice; the References in Grey's Hudibras, Part II., Canto 2, l. 325; Harris's Life of Cromwell, p. 449, "Cromwell's New Slaughterhouse;" Walker on Independency, Part III.; on the Ecclesiastical Commission of James II., Clarke's Stuart Papers, Vol. II., p. 88 et seq.; Lord Lonsdale's Memoirs, Sheffield, Duke of Buckingham's Works, a Letter stating the Ground for his consenting to sit as a Member of the High Commission; Sir R. Atkyns's Tracts; Cases of Magdalene College, and Cambridge University, St. Tr.)

king is given for the sake of the kingdom, and not a kingdom for the sake of the king." Consequently all kingly power ought to be applied for, and to center in the good of the Kingdom or State: which, in effect, consists in the defence of the subject from the incursions of other nations, and in the protection of their lives and properties from injuries and violence as to one another. A king who can not come up to this character, is to be looked upon as *weak:* but if, through his own passions, poverty, or want of economy, he be in so distressed a condition, that he can not keep his hands off from seizing on his subjects' property, by means whereof he so impoverishes them, that their estates are not sufficient to maintain both: in how much a more *impotent* despicable condition may we justly reckon such a prince to be, than if he were barely unable to defend them against the injuries of others? Such a prince, indeed, is not only to be called *weak*, but *weakness* itself; and is far from being a proper head of a *free people*, whilst he labours under such pressures and obligations. On the other hand, he may well be esteemed a free and powerful prince, who can protect his subjects against a foreign force as against one another: their properties are safe with respect to their neighbours and fellow-citizens, not liable to the oppression or depredation of any one: not even though the prince himself should have passions and occasions of his own to gratify: for who can be more powerful or free than that prince who can not only bring others within due bounds, but can also get the better of his own passions? which that prince can, and always does, who governs his people in the political way. So that experience sufficiently shews you, my Prince, that those ancestors of yours, who were so much set upon abolishing the *political* form of government, had they been able to have compassed it, would

not only have been disappointed of their aim and wish of enlarging their power thereby; but would, by this means, have exposed both themselves and the whole kingdom to far greater mischief and more eminent danger. Nevertheless, what we have shewn from the experience of the ill effects of a *despotic government*, which may seem to check and lessen the power of an absolute prince, do in reality rather proceed from a want of due care, and from misbehaviour, than from any defect in that law by which he governs. And therefore the *regal* power or dignity itself is not hereby lessened: since the power, whether of an absolute prince, or of one limited by laws (as I have evidently shewn in the aforesaid Treatise of the Law of Nature), is equal. But, that the power of an absolute prince is attended with much more difficulty in the exercise of it, and with less security both to king and people, the foregoing observations do, I think, sufficiently demonstrate. So that a wise prince would not wish to change the *political form* of government for an *absolute*: and for the same reason it is, that St. Thomas is supposed to wish, that all the kingdoms and nations of the world were governed in the *political* way.[1]

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[1] A very perverse use is made of some passages in this chapter by Sir John Davies, in his Treatise on Impositions. He observes, that the King of England, according to Fortescue, has equal power with other monarchs, and thence infers that he has a right to lay impositions on his subjects, in the same manner that they do. It was usual in the time of King James, to attempt to support the arbitrary measures of the Government by arguments drawn from the prerogatives of foreign princes. In Sir W. Temple's Memoirs is related a curious conversation, relative to the subject in the text, between King Charles the Second and Gonovelt, the French Ambassador, in which the latter gives it as his

Chap. XXXVIII.—*The Prince desires the Chancellor to proceed to other Cases wherein the Laws of England and the Civil Laws disagree.*

Prince. You will, I hope, excuse it, my Chancellor, that while I have been proposing my doubts and queries, I have obliged you to digress so far from the main point. What you have explained by the way has been very instructive, though it may have a little taken you off from your principal design; I now earnestly desire you forthwith to proceed; and, as you at first set out and promised me, that you would please to declare some other cases, in the decision whereof the Laws of England and the Civil Law of Nations observe a different method of procedure.

Chap. XXXIX.—*Concerning the Legitimation of Children born before Matrimony.*

Chancellor. Sir! In obedience to your request, I will endeavour to lay before you some other cases, in which the laws aforesaid observe a different determination: which is preferable I will not take upon me to say, but shall leave it to your own judgment. "The Civil Law" legitimates children born before matrimony, as well as after, and qualifies them to succeed in the inheritance of the parents." The Law of England does not admit children born before matrimony to take by heirship. It calls such an offspring *natural*, but not *legitimate*. In the case before us, the Civilians extol

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opinion, conformably to the sentiments of Fortescue, "that a King of England who will be the man of his people, is the greatest King in the world, but if he would be any thing more, he is nothing at all."

their law, because they say that it is an encouragement to marriage, by which the sin is done away, and so the souls of both parties are preserved from damnation. They allege further, that the presumption is that such was the intention of the parties, as it were by way of contract, at the time of committing the act; the subsequent marriage demonstrates as much. Moreover, the Church admits and allows them for legitimate: these, I think, are the chief arguments by which they justify and defend the Civil Law. To this the learned in our Law reply, that the sin of *concubinage*, in the case proposed, is not purged by the subsequent marriage, though in some measure the punishment of the parties offending may be mitigated. They urge further, that the guilty in this case are the less penitent for their offence, in proportion as they find the laws more favourable to it, upon which consideration they likewise become more apt to repeated acts of this kind: and so act in contradiction both to the commands of God and the ordinances of the Church. So that this law not only shares in the guilt of the offender by abetting such a practice, but is quite beside the nature and definition of a good law, "which (as has been already observed) is an holy sanction commanding things which are honest, and forbidding the contrary." Now, the Civil Law, in the case before us, rather prompts on the party to do things which are dishonest. Nor is it a sufficient defence of this law, to say that the Church admits such issue as legitimate. Since our holy mother the Church dispenses with many things which she does not allow of to be done. So the Apostle dissolved the restraint upon virgins, by way of dispensation; when at the same time he advised the contrary, and would rather that all men were even as himself. And far be it that so good a mother should deny her compassion to her sons, whose

case is so much the more deplorable, because they often fall into this sin, being betrayed by that encouragement which the Civil Law allows it: and the subsequent marriage is a good argument to the Church, of their being truly penitent for what is past, and of their resolution to contain for the future. The Law of England has a quite contrary effect: It does not give any encouragement to such a criminal action, neither does it screen the offenders, but lays a restraint upon them, threatens and inflicts a punishment, that they may not offend. The inclination is predominant enough in itself, without any other incitements; it rather wants a curb, the propensions to lust are very importunate and constant: and mankind, seeing they can not be continued of and by themselves, naturally desire to be perpetuated in their species, which, without that, must be soon extinguished: every living creature has an inclination to be assimilated to the first cause, which is of a perpetual eternal duration: the sensation of contact, by which generation is effected, is a greater gratification than the sense of taste, which only preserves the individual. Wherefore, Noah, by way of punishment to his son, who had discovered his father's nakedness, cursed Canaan his grandson, and thereby aggravated his son Ham's punishment more than if he himself had been accursed: wherefore that law which punishes such an offspring, affects the sin with a severer penalty than that which immediately affects the offender in his own person: now, I must leave it to you to judge how truly and zealously the Law of England prosecutes a criminal amour. It is not content only to condemn the offspring to be illegitimate, but debars it from succeeding to the patrimony of the parents. Is not this a chaste law, a law of order? Does it not more effectually discourage this

sin than the Civil Law, which remits the sin of fornication without exacting any punishment at all?

CHAP. XL.—*The Reason why Base-born Children are not in England by the subsequent Marriage legitimated.*

BESIDES, the Civil Law says, that a natural son is the son of the people, concerning which a certain poet,

> Cui pater est populus, pater est sibi nullus et omnis,
> Cui pater est populus, non habet ipse patrem—

"He who has the people for his father seems to have no father at all, or rather every one: he who has the people for his father, has in reality no proper father."[1] Since such an offspring, when born, had no father, how by any subsequent act he can have one, is not known in nature. A woman has by two several men two sons; one of the said men intermarries with her; which of the two sons is legitimated by such marriage? Opinion may prevail, but reason can not decide; there was a time when both of them passed in estimation for children of the people, or community; when neither knew nor had any other father: wherefore, it would seem inconsistent and unreasonable, that a son born afterwards of the same mother in lawful wedlock, whose original is confessedly known, should be debarred of his inheritance; and that either of the other two sons born out of marriage should take as heir: especially in England, where the eldest son, lawfully begotten, inherits to the lands: any indifferent person would judge it no less unreasonable, if a base-born child should have an equal

[1] Haines *v.* Jeffreys, Comyns' Rep., p. 2. Case of the marriage of a bastard, within the Levitical degrees.

share in the inheritance with one who is lawfully begotten. And by the Civil Law, the inheritance is divided amongst the male issue. St. Augustine, in his book (De Civitate Dei), has it, that Abraham gave all that "he had unto Isaac, but unto the sons of the *concubines* which Abraham had, Abraham gave gifts." His observation is, that thereby it seems to be intimated that the inheritance of right does not belong to a *spurious issue*, but only a competent living. Thus St. Augustine; and under the term (*spurious*) he includes all such children as are illegitimate, or born out of wedlock; as the holy Scriptures do likewise, which never give to any such the appellation of bastard. You see St. Augustine, nay, and Abraham too, makes no small difference as to the succession of a spurious or legitimate offspring. Further, another Scripture sets a mark of infamy upon all illegitimate children in the following metaphorical expression: "The multiplying brood of the ungodly shall not thrive nor take deep rooting from bastard-slips, nor lay any fast foundation." The Church also does the same, by not admitting them into Holy Orders; or, if it dispenses with them thus far, yet they are never permitted to enjoy any dignity or pre-eminence in the Church. It is but fit and reasonable, therefore, that human laws should deprive such persons of the privilege of succession; the Scriptures also, in point of birth, judge such inferior to those who are begotten in lawful marriage. Gideon, that mighty man of valour, is said to have had threescore and ten sons of his body begotten; for he had many wives, and but one son by his concubine, and yet this one son slew all his brethren, except Jotham, the youngest, who hid himself. More wickedness is found to have been in that one bastard-slip than in threescore and nine lawfully begotten. It is an old saying, "If a bastard be good, it is mostly by accident, or

special grace; if wicked, it is but his nature." An unlawful brood is thought to derive a corruption and stain from the transgression of the parent, without any concurrent fault of his own. So all of us have contracted a very great corruption from the sin of our first parents, though not of so opprobrious a nature: the blemish with which *bastards* are affected, is widely different from that of legitimate children. The mutual culpable lust of the parents affects their offspring, which does not give itself such a loose in the lawful chaste embraces of the matrimonial life. The sin of fornicators is mutual, and in common; and as it bears a near resemblance, therefore, with the first sin, it leaves a worse impression on the issue than that of any other sin which men commit in private without any accomplice. So that a child so born, may rather be called the offspring of sin itself, than of the guilty persons. Wherefore the wisdom of Solomon, distinguishing between a spurious and a legimate offspring, of the latter says: "How beautiful is the offspring of the chaste and nuptial bed? The memory of it is immortal, being acknowledged both by God and man." Whereas the other is not so much as acknowledged amongst men: for which reason they are called the children of the people, or community: and of these the same book of Wisdom says, "Children begotten of unlawful beds, are witnesses of wickedness against their parents in their trial." For being asked about their parents, they reveal their imperfections, as the wicked son of Noah did his father's nakedness. It is therefore thought that the man who was born blind, concerning whom the Pharisee said, "Thou wast altogether born in sin," that he was a *bastard*, and so, in that sense, born in sin: and when they add immediately, "and dost thou teach us?" they seem to intimate as if a *bastard* were not qualified by nature, like

the issue of a lawful bed, either for knowledge, or for teaching others. Therefore that law does not rightly determine, which equals *bastards* with children lawfully begotten in the succession to the inheritance of their parents, when the Church judges them not duly qualified for Orders, or fit to preside in God's inheritance. The Scriptures likewise put a wide distinction between them, as we have above observed: And *nature itself* makes a difference in her gifts, by setting as it were a natural mark or blemish on the natural children, though secretly impressed upon the mind. Which now of those two laws in the case before you, do you hold with and give the preference to?

Chap. XLI.—*The Prince's Approbation of the Reasons given in the foregoing Chapter.*

Prince. Indeed I give the preference to that law which does most effectually cast out sin, and establish virtue. I am also of opinion, that such are least entitled to the benefit of human laws whom the Law of God judges unworthy, and whom the Church excludes from her orders and dignities, as being by nature more prone to wickedness.

Chancellor. I think you judge in the case very rightly. I will now recollect some other cases wherein the Civil and our Laws disagree.[1]

[1] The provisions of the Civil Law, in favor of legitimation by a subsequent marriage, were enacted by Constantine and his successors. The principle on which they were introduced, is thus expressed in the Code: "Cum gratias agere fratribus suis posteriores debeant, quorum beneficio ipsi sunt justi filii, et nomen et ordinem consecuti."[2] The import and effect of the rule can not be understood, without regarding it in connection with the regu-

CHAP. XLII.—*Concerning the Rule of the Civil Law: Partus semper sequitur ventrem.*

THE Civil Laws decree that the issue always follows the *venter*, that is, the condition of the mother: for example,

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lations of Justinian respecting concubines (Hienece. Elem. Jur. Civ. Inst. 1, 10, sec. 165 et seq.; Taylor's Civil Law, p. 273; and see further respecting the Rule, Hargr. Co. Litt. 245 *a*., n. 1; Doctor and Student, Dial. i., c. 25.) It may not be thought uninteresting to advert to a few circumstances, which may serve to exhibit the sentiments of the people of this country upon the subject of bastardy at different periods. The British allowed bastards to inherit. (Hale's Common Law, p. 306.) The epithet bastard was assumed by William the Conqueror, and was applied to him by writers who were his encomiasts. (Appendix to the Second Report of the Commissioners for the Public Records, upon the Authenticity of the Charter of William to the Earl of Britanny, where the Passages from the Ancient Authors are collected; Sir J. Hayward's History of the Norman Kings) The privileges of the bastard Eigne are in unison with the principles of the Civil Law. (See also the Ground of the Decision Tem. Edw. III., cited in Sir M. Finch's Case, 6 Rep.) Selden observes, that notwithstanding the famous dissent of the Barons at the Parliament of Merton, to the proposal for adopting the rule of subsequent legitimation, the children of John a Gaunt, by his wife Catherine, before marriage, were in another reign made legitimate, by act of Parliament. (Diss ad Fletam. For a Commentary upon this Act, and for Coke's Remarks on the Title of Henry VII. to the Crown, 4 Inst. 36, 37. See also the Act for the Legitimation of Sir R. Sadler's Children, Tem. Henry VIII.; Petyt. Manuscript, Vol. VI., p. 336.) Blackstone has elucidated some obscure and extraordinary clauses in a sentence of excommunication, which was denounced with great solemnity, on the occa-

if a *bond-woman* be married to a *free-man*, the children shall be *bond*. Again, if a *bond-man* marrieth a *free-woman* the

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sion of the republication of the Charters, A. D. 1253, by reference to the transactions of the Parliament of Merton, respecting special bastardy. (Blackstone on the Charters, p. 79 et seq.; concerning Special Bastardy, as regarded by the Law of England, before the Statute of Merton, and the Clause in that Statute upon the Subject, Mirror, p. 10; Glanville, lib. vii., c. 13, 14, 15; 2 Inst., p. 96 et seq.; Hurd's Dialogue on the Constitution.) Richard III. took great pains to propagate a belief of the bastardy of the children of Edward IV., and accordingly employed a preacher to deliver a sermon at Paul's Cross, upon one of the passages of Scripture, cited by Fortescue in the text, "bastard-slips shall never take deep roots." (See an Account of this Sermon, Sir T. More's Pitiful Life of Edward V.) The same King thought it politic to proclaim the bastard descent of Henry Tudor, in order to prejudice the country against his pretensions to the Throne. (Letter to Sheriffs of Kent, Paston Letters, Vol. II.) The imputation of a spurious birth attached to Queen Mary and Queen Elizabeth; and the different conduct of these two Sovereigns, in respect of this circumstance, after their accession, are matters of historical notoriety. But less attention has been given by writers to the measures adopted by King James and his predecessor, for establishing the illegitimacy of the Suffolk family. (Much valuable information on this subject is collected in Mr. Luder's Tract on the Succession.) Sheffield, Duke of Buckingham, mentions a difficulty in which the delicacy of the Parliament of Queen Elizabeth involved them, when they were proceeding to pass an act, establishing the title of her issue; the usual language in her father's time, being "issue lawfully begotten." On debate the House considered, that it would be more consistent with decorum, to alter the phrase to that of "natural born issue;" the circumstance, however, created a suspicion among the people, who apprehended that the Queen's great favourite Leicester, in-

children shall be *free:* by the laws of England "the issue does not follow the condition of the mother, but always that of the father:" so that a *free-man* begetteth *free children* whether he be married to a *bond* or *free-woman.* So a *bond-man*, who is married, can beget none but *bond-children.*

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tended to set up for King some bastard of his own, after the death of Elizabeth, pretending that it was born of her, and bred up privately. (Duke of Buckingham's Works "On Treasons.") James II., when Duke of York, always testified great jealousy at the omission of the word "natural," prefixed to the word "son," in warrants and commissions, directed to the Duke of Monmouth. (Clarke's Stuart Papers, Vol. I., p. 596; that the Word "Natural," in a Letter written by Edw. IV., is used in the sense of "Legitimate," Ellis's Original Letters, Vol. I., p. 9; and see ibid., p. 268, concerning a Bastard of Henry VIII., to whom Wolsey was Godfather, and on the Appellation of Fitzroy first given by King John.) Warburton conceives, that the idea of the sins of fathers being visited on children, was made a part of the Mosaic dispensation, in order to supply the absence of any hold upon the mind, arising from the opinion of a future state. In the same manner the law of bastardy, like the provision of forfeiture in treason, if it check the commission of offences highly prejudicial to society, may merit approbation; although the means by which this end is accomplished, are, at first sight, revolting to our sense of justice. In the consideration of this subject, the remarks of Montesquieu may deserve attention, which tend to explain why bastardy ought to be more odious in free States than under an arbitrary government. But whatever may be the expediency of the incapacities to which, by the spirit of our jurisprudence, illegitimate children are subject, considered as political regulations, the moral effect which the circumstances of their birth may have upon the mind, is a totally different question. As to this, the life of Savage affords an interesting comment on the text: and tends to shew that the aberrations of the offspring of

Which law think you is more equal in its decision? Is not that a cruel law, which, without any fault of the party, adjudges the issue of the *free-man* to be *bond;* neither is that law deemed by some less cruel, which adjudges the issue of a *free-woman* to be *bond:* the Civilians say, that their laws give the best *determination* in the case; for they say, "A good tree can not bring forth bad fruit, neither can a corrupt tree bring forth good fruit." And it has the consent of all laws, that every plant belongs to the soil where it is planted: the child also has a more certain knowledge of the mother who bore him, than of the father who begot him. To this the *sages* in *our laws* reply, that a child lawfully begotten hath no more certain knowledge of the one parent than of the other; for both laws, however wide in other respects, agree in this, that he is the father whom the marriage declares so to be. Is it

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an unlawful intercourse, are rather to be attributed to the disadvantages to which their education is likely to be subjected, than to any natural depravity derived from the crimes of their parents. This is the subject of pathetic lamentation, by that ill-fated man of genius.

————No mother's care
Shielded my infant innocence with prayer:
No father's guardian hand my youth maintained,
Called forth my virtues, or from vice restrained.
. . . .
From ties maternal, moral and divine,
Discharged my grasping soul—pushed me from shore,
And launched me into life without an oar.

(And see Edmund's Soliloquy in Lear; the Character of Absalom in Dryden's Absalom and Architophel. For a Mine of Historical Information respecting the Subject of this Note, see Tiraquell de Nobilitate.)

not more reasonable that the issue should follow the condition of the father, than that of the mother, since Adam, speaking of such as are joined in wedlock, says, "And they two shall be one flesh:" which our Saviour, in the Gospel, thus explains, "They are no more twain but one flesh." And forasmuch as the male comprehends the female, the whole flesh, so made one, ought rather to regard and to be referred to the male, as the more worthy. "Male and female created he them, and called their name Adam." The Civil Laws themselves allow, that the woman always shines by reflection from her husband, whence (C. De Incolis, Libro X. ti. fi.[1]) the text has it, "We advance women by giving them the titles and honors of their husbands:" we honor them with the sirnames of our families. We proceed and decree for and against them in the courts of law in the name of the husband. We change their habitations: but in case they afterwards marry a man of inferior rank, they are deprived of their former honors, and follow the condition, as well as habitation of the latter husband. And since all the children, especially the sons, bear the name of the father, and not of the mother, whence can it be, that the son, in respect of his mother, should lose his rank and follow her condition, when, at the same time, he is known in law by the name of his father who begot him: nay, the woman is distinguished according to the rank and quality of her husband, neither of which can suffer diminution, or be sullied by any crime or base condition of the

[1] The reference in the MS. and in all the printed editions is given thus: C. (*i. e.* Codex) qui professione se excussant, lib. ix. li. fi.—the author having quoted a wrong codex, and having written "li. fi." instead of "ti. fi." for "tituli fine."

wife. That law ought to be accounted cruel and unjust, which, without any the least pretence or reason, leaves the son in a base condition. Again, as to the inheritance, which the father (a free-man, lying under no imputation, crime or disability in law, whereby forfeitures accrue) has, with great care and industry, acquired for himself and family, that in the case before us the inheritance should pass into the possession of a stranger who took no pains in the acquisition thereof, seems very unjust. Further, the base condition of the child affects the father's name with the same blemish. Again, that must needs be judged to be an hard and unjust law, which tends to increase the servitude, and to lessen the liberty of mankind. For "human nature is evermore an advocate for liberty." God Almighty has declared himself the God *of liberty:* this being the gift of God to man in his creation, the other is introduced into the world by means of his own sin and folly; whence it is, that every thing in nature is so desirous of liberty, as being a sort of restitution to its primitive state. So that to go about to lessen this, is esteemed both wicked and cruel: it is upon such considerations as these that the laws of England, in all cases, declare in favour of liberty. True it is, where the father is a *bond-man*, though married to a *free-woman*, the child is, by *our laws*, in the same state of *bondage* with the father; nor is this unreasonable or unjust: for a woman who has undervalued herself by marrying a *bond-man*, is thereby made *one flesh* with him. In consequence of the laws above recited, she follows the condition of her husband, and by her own voluntary act hath put herself under subjection to him, having been before under no constraint of the law so to do. Those, who by act of law enter themselves *bond-men* in the king's courts, or sell themselves into *bondage* without any compul-

sion, are in the same case. How then can the laws make that son *free*, whom the mother, in the present instance, has so brought forth in her state of *subjection:* for no husband can ever be so much in subjection to his wife, let her be of never so high a rank or quality, as this woman hath made herself *subject* to her husband; whom, though a *bond-man*, she hath advanced to be her *lord*, according to the sentence of God himself, pronounced in Holy Scripture, "that every wife shall be in subjection to her husband, and he shall rule over her." What the Civilians say concerning the fruit of a good or corrupt tree, is more to our purpose than to theirs; since every wife is either *bond* or *free*, according to the condition of her husband. And in whose soil (pray) does the husband plant, if not his own, when the wife is made *one flesh* with him? What if he hath grafted a slip of good kind upon a crab-stock, since the tree is his property, is not the fruit still his fruit, though it favour of the stock? So the children begotten of a woman are the husband's, whether the mother be *bond* or *free*. Nevertheless, by the laws of England, the lord of a *bond-woman*, who is married to a *free-man*, without his consent first had and obtained, I say, in this case, though the lord can not get her divorced *a vinculo matrimonii* (it being expressly said in the Gospel, "Whom God hath joined together let no man put asunder,") yet he shall recover against the *free-man* all his damages which he hath sustained by reason of the loss of his *bond-woman*, and of the service which she owed him. This, I conceive, is the sum, substance and manner of proceeding according to the laws of England, in the case now declared. And now, my Prince, what is your opinion of the matter, and

which of the two laws do you judge to be the most eligible?[1]

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[1] Ulpian regards the maxim which is mentioned in the text, as a part of the Law of Nature. It may be considered as flowing from a more general principle in the Civil Law, "Pater est quem nuptiæ destinant." Whereas the cohabitation between two slaves, or between a slave and a free-man, was called contubernium, and not nuptiæ, or matrimonium: and to such intercourse, the Imperial Law did not give so much countenance as to presume the father certain. (Taylor's Civil Law, p. 425. Concerning the Right of Dominion in the Mother, see Hobbes' de Corpore Politico, c. 4.)

This chapter of Fortescue is remarkable for exhibiting a view, taken by a contemporary writer, of a state of society, which has long ceased to exist in England. The origin of villeins in this country has been variously accounted for: The conquest of the Britons by the Saxons, or the circumstance of the latter people having brought over with them their slaves from Germany, are assigned as the probable causes of slavery in this country: the practice of sanctuary, by which the person taking refuge, was sometimes obliged to become the villein of the proprietors of the asylum, may have increased the numbers of the servile class. By an inhuman act, passed A. D. 1543, vagabonds were adjudged to be the slaves of any one who presented them to a justice. It was contended by Mr. Hargrave, in his argument for Somersett the negro, that the English Law recognized as villeins, only those persons whose families had been such time out of mind. (Archæol. Antiq. Soc., Vol. II., pp. 312, 349; Hallam's Middle Ages, Vol. II., p. 136; Burnet Hist. Ref., Part II., B. 1, p. 83.) In enquiries respecting the condition of the ancient villeins, it is necessary to attend to the distinction between the villani and servi, which is preserved throughout Domesday Book, and to the primary meaning of the term "villanus," as collected from the more ancient laws, in which it is used to signify simply the inhabitant of a

CHAP. XLIII.—*The Prince yields his Assent to the Chancellor, and disapproves of the said Rule.*

Prince. There is no pretence in reason to doubt but that in this case the Laws of England excel the Roman

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Vill. (Lord Lyttleton's Henry II., Note to a Law of the Conqueror, Append. to Book I., and the Notes to Book II.; Kennet's Parochial Antiq. Gloss. Villanus, Servus; Hallam's Middle Ages, Vol. II., p. 135; Diss. on D. B. Report of the Commissioners for the Public Records. For the use of these Terms by our earliest Law Writers, Glanville, lib. v. per totum; Bracton, lib. iv., pp. 190, 192.) Villenage forms the subject of the fifth book of Glanville: and it is highly interesting to trace the gradual relaxation of the many rigorous principles of the law, in respect of villeins, which prevailed in the time of that author. Thus, with reference to the subject of the present chapter, he lays it down, that if a free-man take to wife a woman born in Villenage, he shall be deemed a villein during the marriage: but we learn from Britton that the law afterwards changed, and the wife became enfranchised, so long as the husband lived. (Glanville, lib. v., c. 6; Britton, 78 *b*.) As many persons, of free condition, held lands according to Bracton's expression, "nomine villenagii et non nomine personæ," it would be irrelevant to investigate the circumstances attending transformation of villenage tenures into the modern copyholds: it may be noticed, that more than half of the lands in this country are supposed to have been held by base services; however, at the period when Fortescue wrote his treatise, it is probable the tenure by pure villenage was nowhere to be met with in England. (See on this Subject, Reeves's History of the Law, Rich. II., Edw. IV.; Hallam's Middle Ages, Vol. II., pp. 134, 381, 385; Blackstone on Copyholders; Barrington on 1 Rich. II.) To Wickliff and his followers, is to be ascribed the merit of propagating the doctrine, that the Christian Religion is repugnant to

Imperial Laws: and, for my own part, I always think that law most eligible, which shews more favour than severity to the parties concerned in it, and who are to be judged by

slavery: Sir T. Smith mentions that the lower orders of the Clergy were very zealous in procuring the manumission of villeins: a preamble to a manumission by Henry VIII. recites that the act is pious and meritorious with God, who created all men free: a commission is preserved in Rymer, which was issued by Queen Elizabeth, for giving their freedoms to such of her villeins, as chose to pay a composition; whereas Glanville states it to be the law when he wrote, that a villein was incapable of purchasing his own manumission: Sir T. Smith says, that in all his time, he never knew any instance of a villein in gross. Mr. Hargrave, in his argument for Somersett the negro, has detailed a multitude of devices and fictions, by which the law of England assisted a man in liberating himself from bondage: and he has collected the rules, which have been adopted in his favour, for the purpose of securing him an impartial trial, when his liberty is at stake. In the same spirit, Lord Bacon and Sir E. Coke enumerate three things, to which the law of England extends its extraordinary protection, and these are, life, dower, and liberty. (On Charters of Manumission, see Hickes's Diss. Epist.; Madox's Formulare Anglicanum; Robertson's Charles V., Vol. I., n. 20; on Villeins being included in 29th Art. of Magna Charta, Hallam, Vol. II., p. 382; on the Court for the Misdemeanors of Villeins, 4 Inst., p. 166; on the Use of the Term Slave, St. 1 Edw. VI., c. 3; on the Point, whether the King can confer Knighthood on a Villein, Petyt. Manuscript, Vol. XXXIX., p. 119 *b.;* Petition of the Barons, that no Villein should send his son to school, Brady, Vol. III., p. 393; on the Protection of the King's Presence to a Villein, Plowden, 323; Questions of Law and Conscience respecting Villeins, Doctor and Student, Dial. I., c. 43, Dial. II., c. 18 and 19; on the latest Testimonies to the Existence of Villenage in England, Hallam, Vol. II., p. 393.)

it. For I remember an excellent rule, which says, "that matters of hardship are odious, and ought as much as possible to be restrained, but favours are to be amplified, and extended to their full extent."

Chancellor. With good reason. I will propound one case more, wherein the two laws differ, and then conclude; lest I prove tedious, whilst I expatiate upon the variety of more cases, and the difference each law observes in its decision; and so my discourse would be drawn out into such a length, as instead of entertaining, to disgust you.

CHAP. XLIV.—*Concerning the Tuition of Orphans.*

THE Civil Laws commit the *guardianship* of *orphans* to the next in blood, whether the relation be by the father's or mother's side, that is, to every one as he stands next in degree and order, to take by inheritance, in case the orphan die. The reason of this law is, "no one is presumed to take more care of, or to have a greater regard for the *orphan*, than he who is next in blood." The Laws of England determine quite contrary in the case. If an inheritance which is held in *socage* descend to an *orphan* from any relation by the father's side, such *orphan* shall not be in *guardianship* to any of his father's relations; but he shall be taken care of by the relations of his mother's side. Again, if an inheritance descend to him from any relation by the mother's side, the *orphan* and such his estate shall be under the care and direction of the next akin by the father's side, and not otherwise, *until he come of age*. The law says, "to commit the care of a minor to him who is the next heir at law, is the same as delivering up a lamb to the care of a wolf, that is, to be made a prey of." But if the inheritance be held by *knight's-service*, and not in

socage, then, by the *laws of the land*, the minor and his estate shall not be under the management of his relations of either side; but both shall be under the care and direction of the *lord of the fee*, until he arrive to his complete age of one and twenty: who can be supposed better qualified to instruct him in deeds of arms, which in virtue of his tenure he is obliged to perform for the lord of the fee, than the lord himself, to whom such service is due from his minor; and who is supposed to have a superior interest to advance his ward in the world, in this and other parts of education, than any of his own relations or friends. The lord, in order to have the better service from his tenant, will use his utmost care, and may well be thought better qualified to instruct him in this way than his own relations, who, probably, in this respect are presumed, for the most part, wholly ignorant and unpracticed; especially, if his estate be but a small one: what is or can be of greater use to a minor, who, in consequence of his tenure, is obliged to venture his life and fortune, *if required*, in the service of the lord, than to be trained up in military discipline whilst he is yet a minor. When he comes of full age, he can not decline the nature of his tenure, but is obliged to do suit and service to his lord of whom he holds. Indeed, it will be of no small advantage to the kingdom, that the inhabitants be expert in arms; for the *philosopher* says, "every one behaves boldly in that way in which he knows himself to excel." Is not this law, then, in your judgment, my Prince, to be preferred to the other already described?[1]

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[1] The comparison instituted in this chapter between the provisions of the Civil Law and of the Common Law, in respect of the appointment of guardians, is cited with approbation by Coke in his Institutes. (Co. Litt. 88 *b*.) The expression "agnum com-

CHAP. XLV.—*Concerning the Education of the young Nobility during their Minority.*

Prince. It is so; for in the first instance (as you observe) it provides with greater care and caution for the

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mittere lupo ad devorandum" is similarly applied in the Assizes de Jerusalem and in the Statutum Hiberniæ, 14 Henry III., and the same jealousy of committing the care of the orphan, to a person who can derive any benefit from his death, is found in the laws of other countries. (Assizes de Jerusalem, c. 178; Barr. on 14th Henry III.; and see Glanville, lib. vii., c. 11; Bracton, lib. ii., c. 37; and further concerning this Rule, Craig Jus Feud., L. 2., D. 20, s. 6; Sullivan's Lect. 127; 2 P. Wms. 262.) The reader will probably think that the reasons advanced in favor of the English law of guardianship, upon this particular point, had, it is to be presumed, considerable weight in less civilized times, but are not applicable to the present state of society; and that a person who may eventually become entitled to an estate, will be more likely to preserve it than one who has no prospect of possessing it. In the Civil Law, after Justinian had abolished the distinction of the "agnati" and "cognati" in respect of the right of inheriting, there could be no proximity in blood, without proximity of succession. The regulations of the Civil Law for the protection of minors, were far more perfect than any which existed in this country, in the time of Fortescue. It had its testamentary guardians, and guardians by the assignment of the magistrate: whereas our testamentary guardianship is of no earlier date than the reign of Charles II.; and the jurisdiction of our Chancellors, in the case of wards, has not been traced higher than the year 1696. (Hargr. Co. Litt. 88 *b*.) The Civil Law abounds with judicious provisions for the proper execution of the office of the Tutor and the Curator: and the discharge of these important trusts was a compulsory duty. Our guardianship in *socage* is a very defective institution: originating wholly from the tenure of lands, it

preservation of an *orphan*, than the Civil Law does: but I am much more pleased with the other part of it; because, by

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does not arise unless the infant is seized of real property, holden by socage, and descended upon him. The minor has no guardian in socage, if he be possessed merely of lands obtained by purchase, in the technical sense of the term, or if he have only rent charges or other hereditaments not lying in tenure, equitable estates, personal property or copyholds: in cases where the guardianship in socage exists, it seems doubtful whether it embraces personal property: and there is reason to believe, that the guardianship in socage was anciently the subject of lease and transfer: lastly, it was not until the reign of Anne, that the action of account was given against the executors of guardians in socage: whilst before the expiration of the guardian's trust, the only remedy for his misconduct is in Chancery. As to the guardianship in chivalry, the Law of Wardship was, at the time Fortescue wrote, principally regulated by the Statutes of Merton and Westminster the first: However plain the title to the ward might have been, when the lord and tenant held in fee simple, yet it became a matter of great perplexity, when there were reversions and remainders; and when questions of prerogative, of collusion and the rights of priority, and posteriority were intermingled with the doctrines of estates, discontinuances, disseisins and remitters. The wardship was considered an interest in the guardian, rather than a trust for the minor: it was saleable; it passed to the Lord's representatives; subject to the expense of maintaining the infant, (a duty, the enforcing of which was not very carefully provided for by our law,) the guardian received all the profits accruing out of the land of the ward, for his own emolument. Madox has collected from the records of the Exchequer, numerous instances of trafficking for the King's wards: It appears from the Great Roll of Henry III. that twenty thousand marks were given for the marriage of Isabel, Countess of Gloucester. (Madox's Exchequer, 221 et seq., 322; and see Coke's Comm. on

this means, our young nobility and gentry can not so easily degenerate; but will rather, in all likelihood, go beyond

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Magna Charta, c. 4.) The Paston Letters exhibit many of the evil consequences, arising out of the guardianship in chivalry. So precious were wardships considered in former times, that the conveyance of the ward from place to place was often a matter of considerable danger; we read, on one occasion, of a child being dressed up in a manner to resemble the ward, and being dispatched with a retinue, whilst the real ward was carried privately by another route. The Sheriff was sometimes called upon to take the ward out of the hands of the guardian, who used to detain him beyond the legal period, under a pretence that he was not of age. (Paston Letters, Vol. III., Lett. 51, 54, 55, 56, 64; Vol. IV., Lett. 59, ad finem.) The importance which the feudal lords attached to their wardships, is apparent from the numerous fluctuations in the law respecting them, observable in the early Charters, and the articles of Charters. (See Blackstone on the Charters, passim.) It will not fail to occur to the reader, that most of the advantages pointed out by Fortescue, as resulting from the guardianship by Knight Service, are inapplicable to the case of female wards: whilst the severities to which they were subjected by the Feudal Law of this country, exceeded those to which the male heir was liable. (Glanville, lib. vii., c. 12; Lord Lyttleton's Henry II., Book II., p. 204; Hallam's Middle Ages, Vol. II., p. 165; on the Antiquity of Wardships, Hallam, ibid.; Spelman on Feuds, cxv.; and see ibid. on the Expression in St. Merton, "Si parentes conquerantur;" 2 Inst. 191; on the Court of Wards, 4 Inst. 188; and further on the Topics adverted to in this Note, Hargr. Co. Litt. 88 *b.*, particularly as to the Guardianship by Nature, and its Interference with that of Chivalry; Reeves's History of the Law, Henry VI., Edw. IV.; Ley on Wards and Liveries; Sir T. Smith de Rep., lib. iii., c. 5.)

The numerous inventions which were practiced for the purpose of evading the guardianship in chivalry prove, that it was looked

their ancestors in probity and courage, and in every thing that is virtuous and praiseworthy, being brought up in a superior and more honorable family than that of their parents: nay, though their fathers may have had the good fortune to be educated in the like manner before, yet the father's house, even with this advantage, can not be compared to that of the superior lord; to whom both, in their turns, have been in *ward*. Princes of the realm, being un-

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upon by the nation as a severe burthen. An attempt was made in the time of James, to give a compensation to the King, in lieu of his revenue arising from wards and liveries. (See Coke's Remarks on this Transaction, 4 Inst. 202.) And in the reign of Charles II., the abolition of these and other feudal oppressions was accomplished on the terms of conferring upon the Crown a perpetual excise. (For some curious particulars, relative to the debates on this occasion, Harris's Life of Charles II., p. 369 et seq.; Rose's Observations on Fox's Historical Work, p. 28; Heywood's Vindication, p. 94.) Fabian Phillips has argued with some plausibility against the abolition of feudal wardships; and he dilates with considerable eloquence on the mischiefs which must accrue from the loss of "a seminary of honor, a standing, noble, and more obliged militia." (Ligeancia Lugens, and Tenenda non Tollenda.) Mr. Brodie suggests, that the Law of Wardship had the effect of preventing the aristocracy from acquiring a pernicious influence in society, by accumulations during long minorities, at a period when the other ranks of the community were not able to form a counterpoise to them. The reader will probably think that the institution of the guardianship in chivalry merits his study and attention, not more on account of its effects upon the education and manners of our ancestors, than of its influence on the progress of the domestic liberties of the country, during a considerable period of our history, by the organizing of an armed population, in the absence of mercenary forces, or even of royal guards.

der the same regulation, like as other lords, who hold immediately from the king, can not so soon run into debaucheries, or a downright ignorance: because, during the time of their minority, they are brought up at the court. Upon which account I can not but highly commend the magnificence and state of the king's palace, and I look on it as an *academy*[1] for the young nobility of the kingdom to inure

[1] It was anciently a very common practice for people of condition, to procure their children to be admitted into the house of some great person, in which they discharged menial offices, and procured in return superior advantages of education and the prospect of future patronage: Sir Thomas More gave an early promise of his extraordinary talents during the time he waited at the table of Cardinal Morton. Many curious particulars are related of the domestic establishment of Wolsey, to which there belonged nine or ten lords, fifteen knights, and forty squires: Lord Percy, the admirer of Anne Boleyn, was of this number. Traces of the same custom are to be seen in the familiar letters of the period when Fortescue wrote. (Paston Letters, Vol. III., Lett. 34, 35; Vol. IV., Lett. 14.) And it appears from Sir G. Wheeler's Protestant Seminary, cited in Dr. Wordsworth's Ecclesiastical Biography, that the practice was not obsolete in the time of Charles I. The restraint upon the marriage of the nobility, exercised by some of our Sovereigns, seems to have arisen from the personal submission, which was voluntarily yielded by the children of distinguished families, owing to the limited openings, then existing, for talent and enterprise. The Dutchess of Newcastle, in the life of her husband, mentions, that he possessed a singular knowledge of the use of weapons, which he communicated to no person excepting his own sons, and the Duke of Buckingham, his ward: The martial sports, by means of which the youth of this country were formerly instructed in the art of war, are detailed with great minuteness by Strutt. The tournament was a general name applied to these warlike games; under

and employ themselves in robust and manly exercises, probity and a generous humanity. All which greatly tend

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which was comprised the quintain, tilting at the ring, tournaments, or combats of several knights, justs, or combats between individual knights: from the exercise of the two last species of diversion, all persons below the rank of an esquire were prohibited. These occupations were considered of so great importance, that a statute was made in the reign of Henry V. prescribing regulations for the conduct of them. (Strutt's Antiq., Vol. II.; Strutt's Ancient Sports; Madox Bar. Ang. 202; 3 Inst. 160; Journal of Edw. VI., 2 Burnet Hist. Ref., p. 62; Archæol. Antiq. Soc., Vol. XVIII.; Gloss. Mat. Par. *v.* Torneamentum; Nugæ Antiquæ, p. 1.) In Henry's History are detailed the particulars of a grand tournament held in Smithfield, A. D. 1467. (Henry, Vol, V., p. 536.) And in the Paston Letters, mention is made of a Spanish knight having come to England with a scarf round his arm, offering to run a course with a sharp spear for his fair mistress' sake. (Vol. I., Lett. 2.) It is true, that the reign of Henry VI. is not a distinguished period in the annals of English chivalry; and proclamations of that time were sent round to the Sheriffs of the different counties, "De fugitivis ab exercitu, quos terriculamenta Puellæ exanimaverunt, arestandis." (Rymer, Vol. X., p. 459, 472.) The attention given by our ancestors to these exercises, which exhibit the lively image of war, has contributed in no immaterial degree to our national glory. And it is in the splendid tournaments of the Court of Elizabeth, that we trace the sources of that chivalrous enthusiasm, which instigated the achievements of Lord Herbert of Cherbury, and signalized the last moments, even more than the life of Sir Philip Sidney. (Account of the last Hours of Sir P. Sidney, Harl. Manuscripts; Vitellius, c. xvii. 302; his Military Funeral, Ellis's Original Letters, Vol. III.; Spenser's Astrophel; Comparison between Sir P. Sidney, Lord Herbert of Cherbury and the Chevalier Bayard, Lyttleton's Henry II., note to Book II.)

to the reputation and prosperity of the kingdom, both at home and abroad; and make a great part of its security against invaders, and render it formidable both to its allies and enemies. This advantage could not accrue to the state, if the young nobility and gentry were to be brought up under the care and inspection of their own friends and relations, who are but persons of the same rank and quality with themselves. As to the sons of the *burghers*, and other *freeholders* in *socage tenure*, it can not be prejudicial to the public good, if they be brought up among themselves, with persons of their own degree, and though they be not bound to perform any military services; as, to any one who considers aright, may very plainly appear.[1]

[1] The obligation of military service, arising from tenure, is enforced by the laws of the Conqueror: although the principle upon which the extent of the duty was regulated has been the subject of controversy among legal antiquaries. (Selden's Tit. Hon., Part II., c. 5, sec. 17; Spelman on Feuds, c. 27, on the question whether a Knight's Fee was limited by any definite portion of Land, as two Carucates. See concerning Voyages Royal, and the terms "Intrinseca" and "Forinseca" applied to services, Hargr. Co. Litt. 69 *b*., n. 3, from Hale's Manuscripts, 74 *a*., n. 1, 107 *a*., n. 5; Madox Bar., Ang., p. 226; Reeves's History, Henry III.; Bracton, p. 35 *b*., Arguments in the Case of Ship Money.) The Norman Chronicle expresses with clearness the motive and the manner of levying the first general scutage in this country, which was on the occasion of the expedition against Toulouse, in the reign of Henry II. A levy of this nature had been before assessed, in the second year of the same King, upon Bishops and Abbots holding in capite. (Chron. Norm., p 995; Madox's Exch., c. 26.) The equivalent of scutage does not appear to have been always accepted during the subsequent reigns, especially in the case of tenants in capite holding "ut de coronâ:" and

Chap. XLVI.—*Concerning open Theft and private Theft.*

Chancellor. There are some other cases in which the Civil Law and the Common Law of England differ. For

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fines were occasionally exacted from the Barons, on account of their neglect in performing personal service. This imposition was made the subject of parliamentary assessment; the accomplishing of which is a matter of curiosity in the history of our early charters: it gave rise to several forms of reservation of services, which were made with reference to it, as, for instance, the payment of a specified proportion of all escuages, assessed by Parliament: And whether from this circumstance, or from its being annexed to some particular species of knight-service, and not embracing others, such as cornage and castle-guard, escuage is sometimes spoken of both by Lyttleton and Coke, as if it were a distinct tenure from knight-service, instead of being incident to it, like homage and fealty. (Wright's Tenures, p. 122; Madox's Bar. Angl., p. 227; Hargrave's Notes to Coke Lyttleton, chapters on Escuage and Knight Service; Madox Exch., c. 26; Lord Lyttleton's Hen. II., Notes to Book II.) The last occasion upon which escuage was imposed by the Parliament, occurred in the reign of Edward II., and the mode of levying it was merely traditionary in the time of Lyttleton: Our Kings were generally supplied in their wars by contracts with the nobility and gentry, to serve with so many men, according to the terms of an indenture; this practice appears to have existed as early as the reign of Edward III. (Cotton's Abridg. of the Records, 13 Edw. III., and the References to Brodie's Introduction, p. 246; Henry's History, Vol. V., p. 460; Barrington on 17 Edw. IV.; Case of Soldiers, 6 Rep.; see the Copy of an Indenture for Service against France, in the 19th Hen. VI., and a Letter of the King upon the Subject of the same Expedition, to the Bishop of Bath, Archæol.

instance: the Civil Laws, in case of a *manifest theft*, where a person is taken in the fact, adjudge the criminal to restore fourfold, and for a theft which is not so manifest,

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Antiq. Soc., Vol. XVII.) The history of the Assizes of Arms and Commissions of Array depends altogether upon a different principle than that of the feudal obligation, founded upon the tenure of lands. We read very little of private wars in England; and they do not appear ever to have been legal, notwithstanding there is a passage in Glanville which seems to sanction them: after mentioning the cases in which a lord might claim an aid from his vassals, he states it as doubtful, whether he might also do so ad guerram suam manutenendam: The most prominent instance of what might be deemed a private war, arose out of a contention between the Earls of Gloucester and Hereford, in the reign of Edward I., which terminated in both of those powerful nobles being committed to prison, and paying heavy fines. There is a letter in Mr. Ellis's collection, written by Henry VII., to Sir W. Say, which shews that it was the practice till a late period for persons even of an inferior rank to the nobility, to call upon their vassals to assist them in determining their private feuds. But such acts of outrage and spoliation were repeatedly punished as breaches of the King's peace. (Glanville, lib. ix., c. 8; Hale's P. C., p. 135; Ellis's Original Letters, Vol. I. 39; Hallam's Middle Ages, Vol. II., p. 200; Extracts from D. B. by Gale, Scrip. Hist. Brit., pp. 759, 777; Earl of Northumberland's Case, 5 Hen. IV., Vaughan, 142; Robertson's Charles V., Vol. I., note 21, where some reasons are suggested to account for Private Wars being more rare in England than on the Continent.) It will be collected from the circumstances which have been adverted to in this note, that the feudal institutions did not produce in England those habits of military life, for which the manners of the continental nations of Europe, during the early period of their history, were so conspicuous. A reflection which may go

where the proof is not so plain, the judgment is twice the value of the thing stolen. But the Laws of England, in either case, punish the party with death, provided the thing stolen exceed the value of twelve pence. So in the case of persons who have been *bondmen*, and are set *free*, if afterwards they misbehave, and prove ungrateful, the Civil Laws adjudge them into slavery again. But, by the Laws of England, he who is once made *free*, is always so, let his behaviour afterwards be what it will. Other cases there are not a few, of this and the like kind, which, for brevity's sake, I pass over. In the two cases now propounded, I forbear to expatiate, or insist upon the superior excellence of the Laws of England: the properties of each law do not require such a nice examination: besides, I doubt not, your own good natural genius sufficiently distinguishes between them.[1]

far in explaining the remarkable fact of our ancestors having so eminently surpassed the inhabitants of other European States in a respect for civil rights, the maintenance of equal law, and the establishment of an envied Constitution.

[1] It will be remembered, that theft was not considered in England one of the Pleas of the Crown until Magna Charta, (Reeves's History of the Law, cap. 3; Glanv., lib. i., c. 2; 2 Inst. 32,) and that the civil remedy by appeal of larceny was continued till the Statute of Henry VIII., made for the restoration of stolen goods. (Barrington on Stat. 21 Hen. VIII., 3 Inst. 242.) In examining the criminal jurisprudence of this country, in ancient times, it is proper to take into consideration the privileges of clergy, and of sanctuary, which had a material influence on the practical effect of penal enactments. Benefit of clergy, which was at first claimed in favor of clerks in holy orders, was gradually extended to all persons who were able to read: and, indeed, in the case of a felon who was tried before Fortescue, the prisoner was admitted

CHAP. XLVII.—*The Prince passes on to an Inquiry why the Laws of England are not taught in our Universities, and why there are not Degrees conferred on the Common Lawyers, as in other Professions.*

Prince. I think indeed that it requires no great labour or study, to determine these two points. For though in

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to this privilege, although he could only spell and so put syllables together. In the time of Edward VI., a statute was passed for extending the benefit of clergy to noblemen who could not read. In the reign of Henry VII., and more particularly of Henry VIII., benefit of clergy began to be modelled by the Legislature into a new form, and to be used as a distinction between offences and not between persons. The subsequent history of this privilege corresponds with the progressive improvement of trade and commerce in the country. (Reeves's History of the Law, Edw. I., Edw. III., Hen. VI., Edw. IV., Hen. VII., Hen. VIII.; Barrington on 23 Hen. VIII., cap. 1.) No restrictions appear to have been imposed on the privilege of sanctuary until the reign of Henry VIII. Nor was this impolitic custom abolished till the time of James. (For an Account of Sanctuaries in England, Archæol. Antiq. Soc., Vol. VIII.; Paston Letters, Vol. II., Lett. 24; 3 Inst. 115.) The distinction between thefts manifest and thefts not manifest, is conspicuous in our ancient jurisprudence: it is discernible in the Saxon Laws. The old expression, "to be taken in the manner," is explained by Barrington to mean "detected with the thing holden in his hand," which is called in Bracton "hand-habend," and he supposes that the terms infangthief and utfangthief have reference to the same distinction, but in this he is not supported by the glossarists. Of the like nature are the divisions of offences according to the Forest Law, "Dog-draw, stable-stand, back-bare, bloody-hand;" and by the Halifax Gibbet Law, the prisoner must have been taken hand-habend, or

England felons of all sorts are every where punished with death; yet they still go on in defiance of all laws to the contrary: and, how much less would they abstain, if only a gentler punishment were threatened and inflicted? As for those who have obtained their *freedom*, it would be hard if they should always live under the lash, as it were, and in fear of being again reduced to a state of slavery; especially upon the pretence or colour of *ingratitude*, since

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back-berend, before he was subject to be tried and beheaded, according to the singular custom of that place. (Wilkins's Leges Anglo-saxonicæ, 242, n. 6, 257, n. 9; Manwood, 193; Barrington on 1 Hen. VIII.; on the Offence of Sakebere, 3 Inst. 69.) The distinction between grand and petit larceny is found in the Saxon Laws: in some ancient books of Crown Law, the value of twelve pence without more is stated to make the offence a capital felony. (Wilkins's Leges Anglosaxonicæ, pp. 70, 259, n. *t;* Kelham's Briton, c. 15, n. 2.) An important change was taking place in the principles of Criminal Law, at the period when Fortescue wrote his treatise, by the gradual rejection of the old maxim of "voluntas reputabitur pro facto;" and the practice was nearly obsolete of punishing men for crimes which they had only meditated, but had not actually committed. (Reeves's History of the Law, Hen. VI., Edw. IV.; Year Book, 13 Hen. IV. 85, an indictment for that "il gisoit deprædando;" 9 Edw. IV. 28.) The severity of punishment in cases of larceny, inflicted by our ancient laws, did not produce the effect expected to be derived from it. Fortescue, in his Treatise on Monarchy, mentions that there were more men hanged in England for open robbery in a year, than in France during seven years, which he ascribes to the "lack of heart" of the French people: it appears from the Paston Letters, that the roads near London were much infested with robbers. (Vol. III., Lett. 64.) At a period of history somewhat later, the distresses of the population arising from the system of inclosures,

pretences of this kind could never be wanting; the several instances and species of ingratitude being innumerable. "Human nature, in case of liberty, demands greater favours than is usual in other cases." But, my good Chancellor, not to enter into the disquisition of any more cases of this sort, I beg you to inform me why the Laws of England, which are so useful, so beneficial and desirable, are

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and the dissolution of the religious houses, led to the execution of such numbers of malefactors, as to affix to those criminal laws, which are the subject of Fortescue's commendation, a very bloody and appalling character. (Sir F. More's Preface to the Utopia, "fures nonnunquam suspendi viginti in unâ cruce," Harrison's Description of Britain in Holin., Vol. I., p. 182 et seq., where, amongst other facts, it is said that Henry VIII. hanged threescore and twelve thousand.)

With respect to the remarks of Fortescue, concerning the Civil Law in this chapter, it is to be noticed, that a distinction is observed by Justinian between public and private crimes, the latter class being such as besides the mischief to the public, occasioned a particular damage to individuals. But, in addition to the civil remedy, which was given to the party injured, there might be a criminal prosecution for a private crime: accordingly there were many punishments, other than of a pecuniary nature, prescribed against theft by the Civil Law: and the different circumstances under which theft might be committed, are defined and provided for by the Civil Law with a precision in which our own laws were long deficient. (Wood's Inst. of the Civil Law; and see Lord Kaimes's Tract upon Criminal Law.)

The comparison between our Municipal Laws, and those of Rome and other countries, is further pursued by several English writers. (Fulbecke's Parallel between the Civil Law, Canon Law, and Law of the Realm of England, published A. D. 1618; Doctor and Student, Dial. ii., c. 45.)

not taught in our Universities, as well as the Civil and Canon Laws, and why the degrees of Bachelor and Doctor are not conferred upon the Common Lawyers, as is usually bestowed on those who are educated in other parts of learning.[1]

[1] Queen Elizabeth addressed the University of Cambridge in Latin, after being informed that nothing was allowed to be said openly to that learned body in English. Her speech is given in Peck's Desiderata Curiosa; the commencement of it is in the following terms: "Etsi fœminilis pudor, clarissima Academia subditique fidelissimi, in tantâ doctorum turbâ inelaboratum hunc sermonem et orationem me prohibet apud vos narrare," etc. (See respecting the Injunctions for speaking Latin in private Colleges, by the Charters of Foundation, Fuller's Worthies, p. 222; and the Life of Waynfleete.) An arrangement of the Common Law was made by Dr. Cowell, after the model of the Institutes of Justinian, and written in the Latin language, with the professed view that in the Universities where the Civil Law was studied, the transition might be rendered more easy to an acquaintance with the Municipal Law. Blackstone, in his Commentaries, speaks of the reason given in the text for the neglect of the Law of England in our Universities, as being unsatisfactory; and he attributes the circumstance to the jealousy entertained of the Municipal Law by the Popish Clergy.

It can scarcely be doubted, that if the system of education, adopted at the Universities, were to be modified with the peculiar view of forming the mind and character of the future lawyer, it ought to undergo material alterations. It would embrace a more extensive range of acquirements, and would comprise the historical occurrences of modern, not less than of ancient times. Whereas at present by every deviation from the pursuit of classical or mathematical knowledge, the student makes a sacrifice of his prospects in the University, and of academical fame. The object of a lawyer's acquaintance with the abstract sciences, and

Chap. XLVIII.—*The Chancellor's Answer.*

Chancellor. In the Universities of England the sciences are taught only in the Latin tongue, whereas the Laws of England are writ in, and made up of, three several languages, English, French and Latin. English, as the Common Law has mostly prevailed, and been used among them; a great part of it being derived down from the old inhabitants, the Angles. French, because the Normans upon the coming in of William, called the Conqueror, and

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the writers of antiquity, is to learn to think with propriety, and to act with magnanimity, in the circumstances of life in which his profession may place him; and to acquire the art of expressing his sentiments with precision, simplicity, and good taste. It is not to excel in the legerdemain of the analyst, or to acquire a pre-eminent knowledge of tongues. In this view it is thought, that much of the attention which the ambitious student in the University devotes to his Greek, his Latin, or his Mathematics, might be better directed; at the same time, without his abandoning the inestimable advantages which a lawyer may reap from those important studies. However, constituted as the system of academical education at present is, the future lawyer is employed at the University during the period of life usually spent there in a manner infinitely more advantageous than in the receptacles of an attorney's or a special pleader's office, where the arts of litigation, and not the precepts of Justice, are inculcated: In the Universities the student will find leisure and encouragement to prepare himself for the exercise of his profession, by climbing up to the "vantage ground," so my Lord Bacon calls it, of science; instead of grovelling all his life below, and finishing his mean, though gainful career, by ultimately attaining to the character of the pettifogger, described by Cicero: "Leguleius quidam cautus, et acutus præco actionum, cantor formularum, auceps syllabarum."

getting possession of the kingdom, would not permit our lawyers to plead but in that language which they themselves knew, and which the advocates of France use in their pleadings and in their Parliaments. In like manner the Norman-French, after their coming into England, would not pass any accounts of their revenues, save in their own native language, lest they should be imposed upon: even in their exercises and diversions, as *hunting*, *dice*, *tennis*, etc., they observed the same method: whence it has happened, that the English, from such their frequent intercourse with the French, have given in to the same custom; and to this very day, in their diversions, and their accounts, they speak French: in the Courts of Justice they formerly used to plead in French, till in pursuance of a Law to that purpose that custom was somewhat restrained, but not hitherto quite disused; first, by reason of certain *law terms*, which the pleaders express more aptly in French than in English: in the next place, because Declarations upon Original Writs can not be formed so properly and agreeably to the nature of those Writs as in French, in which language the forms of such Declarations are learned and practiced. Again, all pleadings, arguments and resolutions which pass in the King's Courts are digested into books for the information of the young students, and are reported in the French tongue. Many Acts of Parliament are penned in French, from whence it comes to pass that the modern French is not the same with that used by our lawyers in the Courts of Law, but is much altered and depraved by common use: which does not happen to the Law-French used in England, because it is oftener writ than spoken: as to the Latin, all Original and Judicial Writs, all Records in the King Courts of Justice, and some Acts of Parliament

are penned in that language. Wherefore the Laws of England being learned and practiced in those three several languages, they can not be so well studied in our Universities, where the Latin is mostly in use: but they are studied in a public manner and place, much more commodious and proper for the purpose, than in any University. It is situated near the King's Palace at Westminster, where the Courts of Law are held, and in which the Law-Proceedings are pleaded and argued, and the resolutions of the Court, upon cases which arise, are given by the Judges, men of gravity and years, well read and practiced in the laws, and honoured with a degree peculiar to them. Here, in Term-Time, the students of the law attend in great numbers, as it were to public schools, and are instructed in all sorts of Law-Learning, and in the practice of the Courts: the situation of the place, where they reside and study, is between Westminster and the city of London,[1] which, as to all necessaries and conveniences of life, is the best supplied of any city or town in the kingdom: the place of study is not in the heart of the city itself, where the great confluence and multitude of the inhabitants might disturb them in their studies; but in a private place, separate and distinct by itself, in the suburbs, near to the Courts of Justice aforesaid, that the students, at their leis-

[1] In the ancient ballad called the London Lyckpenny, written in the reign of Henry VI., are related the mortifications and distresses of a person who came to London to obtain the redress of an injury, without any money in his pocket: he is made to relate his adventures, and in the course of them, he gives a minute and curious description of the appearance of London and Westminster, at the time when Fortescue lived.

ure, may daily and duly attend, with the greatest ease and convenience.[1]

[1] The Statute of the 36 Edward III., referred to in the text, has a singular recital, "that the king, nobles, and others, who have travelled in divers regions and countries, have observed, that they are better governed by the laws being in their own tongue." The recital of the 18 Edward III., St. 11, which is written in French, contains a most extraordinary complaint of the attempts of the King of France, to destroy "the English tongue." (Barrington on 18 Edw. III., where see some conjectural emendations of the passage; and Barrington on 36 Edw. III.) Fortescue repeats part of a passage from Holcot, in which that writer states the Conqueror, from a motive of policy, to have effected a material change in the national language, by means of an ordinance, made for adopting the French, in public proceedings, and for its being taught in all the schools. The authority of Holcot, which has been generally followed by subsequent writers, has been impugned by Mr. Luders, in a learned tract, "On the Use of the French Language, in our ancient Laws, and Acts of State." And he has collected a multitude of valuable particulars, to shew the common use of the Latin, by the Normans, as well in their own country, as after their arrival in England, and likewise on the occasion of their conquests in Sicily. It is certain, that as early as in the time of Edward the Confessor, the French language was much prized in this country. And it would seem, that about the time of Henry II., the use of it was more general, than at any preceding period, among the higher class of society, whereas the lower orders appear never to have abandoned their vernacular tongue. During the interval of about thirty years, which preceded the accession of Henry III., the formation of the English language seems to have taken its rise. A version of Wace's poem of Brut, written in the reign of Henry II., by one Layamon, a Priest, is supposed to exhibit the chrysalis of our language. The earliest English instrument, known to exist, is said to bear the date of 1343.

CHAP. XLIX.—*The Disposition of the general Study of the Laws of England; of the Inns of Chaneery, and the Inns of Court, and that they exceed in number any of the Foreign Universities.*

BUT, my Prince, that the method and form of the study of the law may the better appear, I will proceed and de-

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Rymer contains one of the year 1385. Sir J. Mandeville, about 1350, has been considered the father of English Prose. In the time of Richard II., the English began to supplant the use of French, in the elementary instruction of schools, a change which has perpetuated the names of the persons who first introduced it. (Tyrwhitt's Essay on Chaucer, Ritson's Dissertation on Romance, Wharton's History of English Poetry; Ellis's Specimens of early English Poetry, Johnson's Preface to his Dictionary; Verstegan's Decayed Intelligence, Hallam's Middle Ages, ch. 9; Turner's History of England, Part VI., ch. 1, 2; Madox's Exchequer, pp. 122, 123, and Disquisition on the Romanic, or bastard Latin, in the Preface to the History of the Exchequer.) Upon this subject, the observations of Mr. Luders are valuable, as pointing out the difference subsisting between the Norman and French languages, in the eleventh century. With respect to the use of French in Parliamentary and legal proceedings, it has been suggested by Barrington, that the circumstance of a standing committee in Parliament being appointed to receive petitions fiom France, might have been the cause of the Parliamentary proceedings being usually entered in that tongue, a practice which ceased about the time of this country being dispossessed of its French colonies. The first Act in our Statute Book, in the French language, is the 51 Hen. III.; and Luders remarks, that the earliest ordinances both of France and England, promulgated in that language, are nearly contemporary. The first instance of the use of English, in any parliamentary proceeding, is in the 36 Hen.

scribe it to you in the best manner I can. There belong to it ten lesser inns, and sometimes more, which are called the

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III. The challenge of the Crown, by Hen. IV., and his thanks after the allowance of his title, are recorded in English, which is called his maternal tongue; and English appears occasionally in Parliamentary proceedings during the reigns of Hen. IV. and Hen. V. In the reign of Henry VI., the petitions and bills of Parliament are frequently in English and sometimes the answers also: but the Statutes continued to be in Latin and French: The last Statute wholly in Latin on record is the 33 Hen. VI.; the last portion of any Statute in Latin, is the 39 Hen. VI., c. 2. The publication of Statutes in English is believed to have begun with the commencement of the reign of Hen. VII., and at least from the fourth year of Hen. VII. to the present time, they have been universally in English. (Report of the Committee for the Inspection of the Public Records; Barrington on 51 Hen. III.) With respect to the use of French in legal proceedings, Blackstone says, that it preceded the use of Latin in the entry and enrollment of Pleas: this statement appears to be incorrect. (On the Language of Declarations, Tem. Edw. I., Edw. IV., Reeves, c. 16, 23; on that of the Record, Stephen on Pleading, Appx. n. 14, and during the period from Rich. I. to Edw. II., the Placitorum Abbreviatio.) The Statute of Edw. III. did not apply to the language of records, and the lawyers for a long time afterwards continued to take their notes in French, and such is mentioned to have been the practice of Lord Keeper Guilford, when at the bar. In North's Treatise on the study of the law, it is said that the law is "scarcely expressible properly in English, and when it is done it must be Francois, or very uncouth." Sir P. Yorke, afterwards Lord Hardwicke, in the reign of George II., was the first Serjeant that counted in English. (Wynne's Degree of Serjeant, p. 104; North's Life of Lord Keeper Guilford; and see in the Preface to Croke Charles, Sir H. Grimston's Apology for not Publishing that Work in "its Native Idiom, the proper and

Inns of Chancery: in each of which there are an hundred students at the least; and, in some of them, a far greater

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peculiar Phrase of the Common Law." And see further on the derivation of our legal language and forensic usages from the French, Stephen on Pleading, Appx. n. 30, 59; Craig, Jus. Feud., lib. i., d. 7.) Whitelocke details, in his Memorials, a very learned speech, which was delivered on the occasion of the proposition, made to the Commonwealth Parliament, for translating all the books of the law, and the proceedings of the Courts of Justice, into the English tongue; besides much legal and antiquarian knowledge, it contains many sensible remarks on the policy of the measure, and concludes with an exhortation to the Commons, for passing the bill, expressed in a masterly strain of eloquence. An ordinance which was the consequence of this proposition, passed A. D. 1650, but was annulled at the Restoration; its expediency, however, was felt and recognized by the legislature of George II. Blackstone has questioned the propriety of this alteration in the language of our judicial proceedings, and has supported his opinion by some arguments which have exposed him to the just censure and ridicule of Mr. Bentham. (Fragment on Government.)

With respect to the vestiges of the French language, preserved in some particular instances, mentioned by Fortescue, Madox, amongst his arguments, to prove that the Exchequer was an institution of the Conqueror, states that most of the solemn and emphatic words employed in the business of the Exchequer, are of Norman origin, and that most of the terms of the Forest Law, used in the Exchequer, are derived from the same source. The fact of the general practice of keeping accounts in French, is called in question by Luders, who refers to instances, occurring in the twelfth century, of accounts being kept in Latin. (And see Henry's History, Vol. VI., p. 90.) Barrington, in his observations on the 51 Hen. III., relates several particulars which shew the derivation of our terms of sporting, cookery, and heraldry,

number, though not constantly residing. The students are, for the most part, young men; here they study the nature of Original and Judicial Writs, which are the very first principles of the law:[1] after they have made some progress here,

from the French. See also on the Antiquity of Forests, and the Etymology of the word Purlieu, Hern's Cur. Disc., Vol. I., p. 118, Vol. II., p. 380; on the Hunting of the Britons and Saxons, Archæol. Antiq. Soc., Vol. XV.)

[1] Sir E. Coke observes that students seeing the singular use of original writs, will, in the beginning of their study, learn them, or at least the principal part of them, without book, and he points out the advantages resulting from such a practice. In several of the prefaces to his reports, he appears particularly anxious to refer the antiquity of the writs of the Common Law to a period antecedent to the Conquest: Other writers of equal or greater authority upon this subject suppose the introduction of them to have been coeval with the establishment of the Curia Regis, when causes came to be decided before a tribunal, at a distance from the litigating parties, which was otherwise in the Saxon County Courts. (Hickes's Diss. Epist., p. 8; Madox's Excheq., p. 63; Reeves's History of the Law, c. 2; Stephen on Pleading, Appx. n. 2.) The great Saxon scholar Hickes speaks with much contumely of Coke's learning respecting the times before the Conquest, and calls him "in re forensi antiquâ minus versatum," "in patriæ suæ antiquis consuetudinibus et constitutionibus avitis hospitem." (Diss. Epist., pp. 8, 49.) After the Statute of Westminster the second, writs became a part of the study of the law. The Masters in Chancery, to whom the business of preparing writs had been before confined, gradually relinquished all concern in respect of them, and their forms came to be settled by lawyers of eminence: by the printing of the Register, the knowledge of writs was rendered publici juris, and they formed a most essential part of a lawyer's information, because during the prevalence of real actions, recourse was had to the learning contained

and are more advanced in years, they are admittd into the Inns of Court, properly so called: of these there are four in number. In that which is the least frequented, there are about two hundred students. In these greater inns a student can not well be maintained under *eight and twenty pounds* a year:[1] and, if he have a servant to wait on him (as for the most part they have), the expense is proportionably more: for this reason, the students are sons to persons of quality; those of an inferior rank not being able to bear the expenses of maintaining and educating their children in this way. As to the merchants, they seldom care to lessen their stock in trade by being at such large yearly expenses. So that there is scarce to be found, throughout the kingdom, an eminent lawyer, who is not a gentleman by birth and fortune; consequently they have a greater regard for their character and honour than those who are bred in another way. There is both in the Inns of Court,

in them at every turn and stop of the proceedings. (Concerning Writs, and the Antiquity of the Registrum Brevium, Co. Litt. 73 *b.;* Nichols. Eng. Histor., lib. 215; Jehu Webb's Case, 8 Rep., of a register in the time of Hen. II. in Coke's possession; Plowd 7; Barr. on Statutum, Walliæ and Reeves's History of the Law, Henry VIII., where see a comparison between the Writs of the printed Register, and those in the several antecedent periods of our Law.)

[1] In addition to the remarks on the value of money in a former page, it is to be noticed, that some useful observations on this subject occur in the ninth chapter of Hallam's Middle Ages; this writer considers that sixteen will be a proper multiple when we would bring the general value of money, in the reign of Henry VI., to our present standard. (And see Sir F. Eden's Tables; Lord Lyttleton's Hen. II., Vol. I., p. 470 et seq.; Bl. Comm., Vol. I., p. 173, Vol. IV., p. 238, n.)

and the Inns of Chancery, a sort of an Academy, or Gymnasium, fit for persons of their station; where they learn singing, and all kinds of music, dancing and such other accomplishments and diversions (which are called Revels) as are suitable to their quality, and such as are usually practiced at Court. At other times out of term, the greater part apply themselves to the study of the law.[1] Upon fes-

[1] The account given by Fortescue of the legal profession in the time of Henry VI., has occupied a considerable space in the treatises of all the authors who have written upon the subject of legal Antiquities, since his time. The antiquities of the Inns of Court, and of Chancery, are the subjects of several papers in Herne's Curious Discourses; and Dugdale has investigated them in his Origines Juridiciales. It may be collected, that societies of lawyers began to have permanent residences soon after the Court of Common Pleas was directed to be held in a fixed place, to which circumstance, or to the abolition of the law schools in London, in the nineteenth year of Henry III., the institution of these societies is ascribed by Blackstone. Lawyers were established in the Temple, in the reign of Edward III., when they held the place as the tenants of the Hospitalers, on whom the possession of the estates of the Knights Templars had devolved. An idea of the nature of the studies anciently pursued in the Inns of Court, may be formed from the very minute account which is given in Dugdale, of the exercises, mootings, and readings: and many details of an interesting nature, upon the same subject, are found in North's Life of Lord Keeper Guilford: the biographer supposes his Lordship to have been one of the last persons who read in the Temple in the ancient spirit of the institution, and complains that the exercise had, since his time, dwindled into a revenue; which circumstance he ascribes to the extravagant expenses that the readers formerly incurred in the feasts, which it was incumbent on them to give. Coke describes the nature of ancient readings, which he laments had greatly degenerated in

tival days, and after the offices of the church are over, they employ themselves in the study of sacred and prophane

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his day; he says they had become rather riddles than lectures, and he compares the readers to lapwings, who seem to be nearest their nests when they are farthest from them, and whose study was to find nice evasions out of the Statute. (Co. Litt. 280 *a*. For some interesting circumstances connected with the readings of Sir T. More, Wordsworth's Eccl. Biog.; respecting Bagshawe's Reading, Tem. Car. 1, Whitel. Mem., p. 31. For directions upon the subject of Readings, Bacon's Introduction to his Reading upon the Statute of Uses. For a curious and valuable specimen of an Ancient Reading, Callis upon Sewers.)

The most minute details are furnished by Dugdale, respecting the ancient Revels, grand Christmases, Banqueting Nights, and amusements of the Inns of Courts, and the comic personages who acted conspicuous parts on these occasions, as the Lord of Misrule, the King of Cockneys, and Jack Straw, together with the master of the game, who was appointed by the Lord Chancellor, after hearing a plausible speech in his favor from the Common Serjeant, and who introduced a Fox and a Cat to be killed by Dogs beneath the fire. As to the lighter accomplishments, which Fortescue mentions to have been taught in the Inns of Court, Sir Christopher Hatton first obtained Queen Elizabeth's favor, by his appearance in a masque prepared by the lawyers. (Naunton's Fragmenta Regalia, and see Gray's Long Story.) Saunders excelled on the harpsichord, and Lord Keeper Guilford was a perfect musician. We read that in the reign of James, barristers were put out of Commons by decimation, for the offence of neglecting to dance before the Judges. Sir J. Davis wrote a composition in lyric verse, entitled "Orchestra, or a poem expressing the antiquity and excellency of dancing." Lord Bacon, who composed an essay upon the subject of masques, regrets in his letters the failure of a project, to prepare a joint masque by the

history: here every thing which is good and virtuous is to be learned: all vice is discouraged and banished. So that knights, barons, and the greatest nobility of the kingdom, often place their children in those Inns of Court; not so much to make the laws their study, much less to live by the profession (having large patrimonies of their own), but to form their manners and to preserve them from the contagion of vice. The discipline is so excellent, that there is scarce ever known to be any picques or differences, any bickerings or disturbances amongst them. The only way they have of punishing delinquents, is by expelling them the society: which punishment they dread more than criminals do imprisonment and irons: for he who is expelled out of one society, is never taken in by any of the other. Whence it happens, that there is a constant harmony amongst them, the greatest friendship and a general freedom of conversation. I need not be particular in describing the manner and method how the laws are studied in those places, since your highness is never like to be a student there. But I may say in the general, that it is pleasant, excellently well adapted for proficiency, and every way worthy of your esteem and encouragement. One thing more I will beg leave to observe, viz., that neither at Or-

four Inns of Court, in honor of Queen Elizabeth. A masque, the result of the united exertions of these learned societies, was, however, brought about in the reign of Charles I. Among the Committee for arranging this splendid pageant, will be seen the names of Selden, Whitelocke, Hyde, Finch, Herbert, Noy; and it is said, by the historian, to have been a pleasure to them. The animated description which is given of this masque in Whitelocke's Memorials, will always be read with great interest, as affording a characteristic exhibition of the manners of the age.

leans, where both the Canon and Civil Laws are professed and studied, and whither students resort from all parts; neither at Angiers, Caen, nor any other University in France (Paris excepted), are there so many students, who have passed their minority, as in our Inns of Court, where the natives only are admitted.[1]

[1] Great caution seems formerly to have been observed in admitting persons as members of the Inns of Court, whose rank in society and whose education was not a guarantee for the propriety of their conduct. There is extant an order of King James, signed by Sir E. Coke, Lord Bacon and others, that none but gentlemen by descent should be received. (Dugdale's Origines, p. 316.) The study and practice of the law may in themselves be considered as materially influencing the intellectual, the moral, and political character of the individual. This is a subject which does not admit of being more than merely adverted to, in the compass of a note. It may however be mentioned, that Lord Bacon recommends the study of the law as a remedy for some particular defects in the mental powers: and Burke speaks of it as a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together. And if it be on some occasions the duty of a Barrister to advocate a cause which in his judgment is not founded upon right, or to advance arguments of the solidity of which he is not persuaded, yet such a line of conduct will not, although it be examined according to the strictest philosophical principles, appear repugnant to the moral feelings. (For the opinions of the Stoic Panætius and Cicero, Cic. de Off., lib. ii., c. 14; and see Preface to Sir J. Davis's Reports. For an indictment against a Counsel charged with taking fees on both sides of a cause, Tremaine P. C., p. 261; and Stat West. I., c. 9; prohibition against Serjeants attempting "pur enginer le Court, ou la partie.) In examining the political conduct of lawyers, it will be observed, that as their professional studies lead them to take a near view of the excellencies of the

Chap. L.—*Of the State, Degree, and Creation of a Serjeant at Law.*

But, my Prince, since you are so desirous to know, wherefore, in the Laws of England, the degrees of Bach-

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Constitution, so they have been actuated by a powerful impulse to foster and vindicate it. Accordingly, this country is deeply indebted to the members of the legal profession, for the preservation of its most valued liberties. Bracton and Fortescue are the earliest authorities in favor of our national freedom. The first conspicuous instance of a Commoner opposing in Parliament the arbitrary will of the Crown, was afforded by Sir Thomas More. And in the next reign, when Wolsey came with great magnificence to the House of Commons, in order to overawe the members into granting a parliamentary aid, he met with an inflexible resistance from the same intrepid lawyer. (Wordsworth's Ecclesiastical Biography; Ellis's Original Letters, Vol. I., p. 220.) How much of the wisdom with which the petition of Right was framed, and of the resolution with which it was forwarded, is owing to the learning, sagacity, and intrepidity of Coke and of Selden. How great a part of the merit of the Bill of Rights, and of the spirited publications which prepared the minds of men for the Revolution, is due to Lord Somers. The Restoration might have been a national blessing, if the limitations upon the power of the Crown, which were proposed by Sir M. Hale, had been appreciated and enforced. An attempt was made in the time of the Commonwealth, to exclude lawyers from sitting in the House of Commons. A similar project had been contrived in the reign of Edward III., but it does not appear to have been acted upon until that of Henry IV., and the Parliament in which it was adopted has been called in derision the "Parliamentum indoctum," or the "lack-learning Parliament." Whitelocke has related, in his Memorials, a distinguished speech, which was de-

elor and Doctor are not conferred, as in the professions of the Canon and Civil Law in our Universities, I would give

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livered on the occasion of the debate upon this subject, tending to shew " that those in power had most reason to be displeased with this profession, as a bridle to their power." (Whitel. Mem., p. 415; 4 Inst. 48. And see Introduction to Brodie's British Empire, p. 63, upon a remarkable mistake of Prynne and Whitelocke, in citing a passage from Walsingham, respecting the "Parliamentum indoctum.") Hume has made a reflection, how much the history of this country is indebted to four great men, who held the highest stations in the law--More, Bacon, Clarendon, Whitelocke. One of which number stands pre-eminent above the rest of mankind, whether in the annals of ancient or modern philosophy: whilst the cultivators of literature and the arts will always revere, in Sir Thomas More, the bosom friend of Erasmus, and the patron of Holbein; the man on whom was passed the merited eulogium—" Pectus omni nive candidius, ingenium quale Anglia nec habuit unquam, nec habitura est, alioquin nequaquam infelicium ingeniorum parens." (Erasm., lib. 29, Epist. 42.) The literary taste of this country derived no unimportant benefit from Lord Somers, when he liberally supplied Addison with the means of completing his education, and enabled him to make the tour of Italy.) And further on Lord Somers's Character, Walpole's Noble Authors, Addison's Freeholder, No. 39; Swift's Dedication to the Tale of a Tub, also the Four Last Years of Queen Anne; Hickes's Diss. Epist., on the Saxon Etymology of the word Somers, "maximum et clarissimum.) The muse of Pope never speaks with more feeling to the heart, than when excited by the kindred genius of his Templar friend, whose judicial and senatorial talents and whose "hundred arts refined" were equally "known and honored." Doubtless it would be easy to point out several defects in the mental qualifications of lawyers which may fairly be considered as resulting from their professional studies and habits. This is the natural consequence of the mind becom

you to understand, that though in our Inns of Court there be no degrees which bear those titles, yet there is in them conferred a degree, or rather an Honorary Estate, no less celebrated and solemn than that of Doctor, which is called the degree of a Serjeant at Law. It is conferred in the following manner.

The Lord Chief Justice of the Common Pleas, by and with the advice and consent of all the Judges, is wont to pitch upon, as often as he sees fitting, seven or eight of the discreeter persons, such as have made the greatest proficiency in the general study of the laws, and whom they judge best qualified. The manner is, to deliver in their names in writing to the Lord High Chancellor of England; who, in virtue of the King's Writ, shall forthwith command every one of the persons so pitched upon, that he be before the King, at a day certain, to take upon him the *state* and *degree* of a Serjeant at Law, under a great penalty, in every one of the said Writs specified and limited.

At which day, the parties summoned and appearing, each of them shall be sworn upon the holy Gospels, that he will be ready, at a further day and place to be appointed,

ing addicted to any one particular pursuit; and as such it engaged the attention of Lord Bacon in his celebrated work on the advancement of learning, in which he treats of these impediments to knowledge under the appellation of "idola tribus." Moreover, the allurements of profit and ambition make it more necessary for an English Barrister, than for a person placed in any other class of society, to regard their seductive influence in the light in which the great philosopher, whose writings have just been referred to, has viewed them, that they are "the golden ball thrown before Atalanta, which while she goeth aside, and stoopeth to take up, the race is hindered."

to take upon him the *state* and *degree* of a Serjeant at Law, and that he shall, at the same time, give *gold*, as, according to the custom of the realm, has in such cases been used and accustomed to be done. How each is to behave and demean himself, the particulars of the ceremony, and manner how these estates and degrees are to be conferred and received, I forbear to insert; it will take up a larger description than consists with such a succinct discourse, besides, at other times, I have talked it over to you in our common conversation. But I desire that you should know, that, at the time and place appointed, those who are so chosen, hold a sumptuous feast, like that at a Coronation, which is to continue for seven days together: neither shall any one of the new-created Serjeants be at a less expense, suitable to the solemnity of his creation, than one thousand six hundred scutes (£260) and upwards, whereby the expenses in the whole, which the eight will be at, will exceed twelve thousand eight hundred scutes (£3,200). To make up which, one article is, every one shall make presents of gold rings to the value, in the whole, of forty pounds (at the least) English money. I very well remember, when I took upon me the *state* and *degree* of a Serjeant at Law, that my bill for gold rings came to fifty pounds. Each Serjeant, at the time of his creation, gives to every Prince of the Blood, to every Duke, and to each Archbishop, who shall be present at the solemnity, to the Lord High Chancellor, and to the Treasurer of England; to each a ring of the value of eight scutes; to every Earl and Bishop, to the Keeper of the Privy Seal, to each Chief Justice, to the Chief Baron of the King's Exchequer, a ring worth six scutes; and to every other Lord of Parliament, to every Abbot and to every Prelate of distinction, to every worshipful Knight, then and there present, to the

Master of the Rolls, and to every Justice, a ring to the value of four scutes; to each Baron of the Exchequer, to the Chamberlains, and to all the great men at Court then in waiting on the King, rings of a less value, in proportion to their rank and quality: so that there will not be the meanest clerk, especially in the Court of Common Pleas, but that he will receive a ring convenient for his degree. Besides, they usually make presents of rings to several of their friends and acquaintance. They give also liveries of cloth, of the same piece and colour, which are distributed in great quantities, not only to their *menial servants*, but to several others, their friends and acquaintance, who attended and waited on the solemnity of their creation; wherefore, though in the Universities, they who are advanced to the degree of Doctors are at no small expense at their creation, in giving *round caps* and other considerable presents: yet they do not give any gold, or presents of like value: neither are at any expenses in proportion with a Serjeant at Law. There is not, in any other kingdom or state, any particular degree conferred on the practicers of the law *as such;* unless it be in the kingdom of England. Neither does it happen, that in any other country, an Advocate enriches himself so much by his practice as a Serjeant at Law. No one, be he never so well read and practiced in the laws, can be made a Judge in the Courts of King's Bench, or the Common Pleas, which are the supreme ordinary courts of the kingdom, unless he be first called to be a Serjeant at Law: neither is any one, beside a Serjeant, permitted to plead in the Court of Common Pleas, where all real actions are pleaded: wherefore, to this day, no one hath been advanced to the *state* and *degree* of a Serjeant at Law, till he hath been first a Student, and a Barrister, full sixteen years: every Serjeant wears in Court a *white silk coif*, which is a

badge that they are *graduates in law*, and is *the chief ensign of habit* with which Serjeants at Law are distinguished at their creation. Neither shall a Judge, or a Serjeant at Law, take off the said *coif* though he be in the Royal Presence and talking with the King's Majesty. So that you will easily believe, most excellent Prince, that those laws which are so honoured and distinguished beyond the Civil Laws, or those of any other kingdom whatsoever, and the profession whereof is attended with so much solemnity and magnificence, are in themselves exceeding valuable, excellent and sublime, full of knowledge, equity and wisdom.[1]

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[1] In Fleta, the practicers of the law are enumerated under the classes of Servientes, Narratores, Attornati, and Apprenticii. They are ranked under various other denominations by subsequent writers, and there has been a difference of opinion respecting the meaning of several of the distinctions. (Reeves's History of the Law, ch. 11, 30, Preface to the third Report. On a supposed distinction between Narratores and Servientes, Reeves, ch. 11; between Barristers and Utter-barristers, Wynne's Eunomus; Blount, Reeves, ch. 30. On the meaning of the term Apprentice, and the difference between Apprenticii ad Legem, and ad Barris, Barrington on 20 Rich. II.; Dugdale's Origines, 143; Mitchell's Case, Atk. Rep., Vol. II.; Somers's Gloss. ad X. Scriptores. On the Antiquity of Advocates, Stephen on Pleading, Appx. n. 8.)

The degree of Serjeant, which is the particular subject of Fortescue's remarks in this chapter, has been exalted by every circumstance with which erudition or eloquence could ennoble it, in a speech delivered by Whitelocke, and which is related in his memorials. The subject is treated of in the preface to the tenth Report, and it has received great embellishment from the orations which have been spoken at different times on the occasion of the creation of Serjeants. (See Wynne, on the Degree of Serjeant,

Chap. LI.—*Of the Judges of the Courts in Westminster Hall; the Manner of their Creation, Habit, and Employment.*

That you may likewise know the estate of the Judges, as well as of the Serjeants at Law, I will, in the best manner I can, lay before you the method of their appointment, creation, and the nature of their office. There are usually in the Court of Common Pleas *five* Judges, *six* at the

pp. 109, 65.) A writ for the call of Serjeants at law was contained in the MSS. Registrum Brevium. Serjeants are noticed by Bracton, and the title occurs in our records, as early as the time of Edward the First. Whitelocke mentions that a Serjeant is addressed in the plural number in his writ, an honor which does not appertain even to Sheriffs. In Popham's Reports is contained a remarkable exhortation, delivered by the Chief Justice to the newly created Serjeants, in which a sage admonition is drawn from every minute peculiarity of their dress. The research of legal Antiquarians has preserved a multitude of curious facts, in addition to the particulars in the text, respecting the rings, mottos, feasts, and other matters connected with the ancient degree of Serjeant at law. (Wynne's Serjeant at Law, p. 75, Mottos, p. 141, Rings, p. 114; Feasts, Dugdale's Origines, p. 41 et seq.; Spelman's Gloss. v. Serviens ad legem; Mirror, ch. Des Conteurs et des Loieurs; Barr. on 14 Edw. III.; Wynne's Eunomus; Spelman, Gloss. v. Coifa. On the Pillars of Pawle's Dugd. Orig., p. 117; Whitel. Mem., p. 348; 9 Mod., p. 9; and Life of Holt, for the Remonstrance of Keeling, C. J., upon the Diminution in the weight of Rings; on the Compulsory appointment of Serjeants, Tem. Henry V., Reeves, c. 25; on the Removal of Dudley from the degree of Serjeant, Biog. Britan. In Strutt's Antiq., a drawing of a Serjeant in the Coif and Robes of the time of Hen. VII.)

most; in the Court of King's Bench *four*, and sometimes *five:* when any one of them dies, *resigns*, or is superseded, the King, with the advice of his council, makes choice of one of the Serjeants at Law, whom he constitutes a Judge, by his Letters Patent, in the room of the Judge so deceased, resigning or superseded: which done, the Lord High Chancellor of England shall come into the Court where such vacancy is, bringing in his hand the said Letters Patent; when sitting on the bench, together with the Judges of the Court, he introduces the Serjeant who is so appointed to be a Judge; to whom, in open Court, he shall notify the King's pleasure concerning his succession to the vacant office, and shall cause to be read in public the said Letters Patent: after which, the Master of the Rolls shall read to him the oath of office; when he is duly sworn into his said office, the Chancellor shall give into his hands the King's Letters Patent, and the Lord Chief Justice of the Court shall assign him his place where he is to sit, and makes him sit down in it. But you must know, my Prince, that the Judge, amongst other parts of his oath, is to swear that he will do equal law and execution of right to all the King's subjects, rich and poor, without having regard to any person. Neither shall he delay any person of common right, for the letters of the King, or of any other person, nor for any other cause, though the King by his express directions, or personal commands, should endeavour to influence and persuade the contrary. He shall also swear, that he will not take by himself, or by any other, privily nor apart, any gift or reward of gold, or of silver, nor of any other thing, the which might turn him to profit, unless it be meat or drink, and that of little value, of any man that shall have any plea, or process, depending before him, and that he shall take no fees, as long as he be Justice, nor robe of any per-

son, great or small, in any case, but of the King himself. You are to know moreover, that the Judge so created is not to make any solemn entertainment, or be at any extraordinary expense upon his accession to his office and dignity; because it is no *degree* in law, but only an office and a branch of magistracy, determinable on the King's good pleasure. However, from thenceforth, he changes his habit in some few particulars, but not in all: for when only a Serjeant at Law, he is clothed in a long robe, not unlike the sacerdotal habit, with a *furred cape* about his shoulders, and an hood over it, with two labels or tippets: such as the Doctors of Law use in some Universities, with a *coif*, as is above described. But after he is made a Judge, instead of the hood he shall be habited with a *cloak*, fastened upon his right shoulder; he still retains the other ornaments of a Serjeant, with this exception, that a Judge shall not use a party-coloured habit, as the Serjeants do, and his cape is furred with *minever*, whereas the Serjeant's cape is always furred with white lamb; which sort of habit, when you come in power, I could wish your Highness would make a little more ornamental, in honour of the laws, and also of your Government. You are to know further, that the Judges of England do not sit in the King's Courts above three hours in the day, that is, from eight in the morning till eleven. The Courts are not open in the afternoon. The suitors of the Court betake themselves to the *pervise*, and other places, to advise with the Serjeants at Law, and other their counsel, about their affairs. The Judges when they have taken their refreshments spend the rest of the day in the study of the laws, reading of the Holy Scriptures, and other innocent amusements, at their pleasure: it seems rather a life of contemplation than of much action: their time is spent in this manner, free from

care and worldly avocations. Nor was it ever found that any of them has been corrupted with gifts, or bribes. And it has been observed, as an especial dispensation of Providence, that they have been happy in leaving behind them immediate descendants in a right line. "Thus is the man blessed that feareth the Lord." And I think it is no less a peculiar blessing, that from amongst the Judges and their offspring, more Peers and great men of the realm have risen, than from any other profession or estate of men whatsoever who have rendered themselves wealthy, illustrious and noble by their own application, parts and industry, although the merchants are more in number by some thousands; and some of them excel in riches all the Judges put together. This can never be ascribed to mere chance or fortune, which is nothing; but ought to be resolved (I think) into the peculiar blessing of Almighty God, who, by his Prophet, hath declared, that "the generation of the upright shall be blessed." And elsewhere the Prophet, speaking of the righteous, says, "their children shall be blessed." Wherefore, my Prince, be a lover of Justice, which maketh rich and honourable, which perpetuates the generation of those who love her: in order to this, be a zealous lover of the Law, which is the parent of Justice, that it may be said, and verified of you, which is written of the righteous, "Their seed shall endure for ever."[1]

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[1] The Appendix to Heywood's Vindication of Fox's History contains an historical account of the tenure by which Judges held their offices under the house of Stuart, together with a list of most of those who were removed for political causes. Several particulars respecting the ancient patents of Judges are mentioned in the notes of the Earl of Hardwicke, which he prepared on the

Chap. LII.—*The Prince starts an Objection with Respect to the Delays in Law-Proceedings.*

Prince. There remains but one thing, my Chancellor, to be cleared up, which makes me hesitate, and gives me

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occasion of moving the address upon the speech of His Majesty George III., respecting the independence of the Judges. (Parl. Hist., Vol. XV., and see Speaker Onslow's Note to Burnet, Vol. II., p. 12.) And many interesting facts have been collected respecting the antiquity of Judges, their number at different periods, their dresses, salaries, and other facts connected with their appointment. (Dugdale's Origines, 37, 38, 39, 40; Reeves's History of the Law, c. 8, 11, 16, 17, 25, 27, 30; Bl. Comm., Vol. III., p. 40; Whitelocke's Memorials, pp. 344, 392; Archæol. Antiq. Soc., Vol. XVI., Petition in the time of Henry VI., by a Judge, for an Increase of Salary; Selden's Titles of Honor, Part II., c. 5, concerning the Collar of SS. D'Israelis Cur. of Lit., 2 Series, Vol. I., p. 298, Anecdote respecting the Collar of Sir E. Coke, from the Sloane Manuscripts; on the Title of Capitalis Angliæ Justiciarius, assumed by Sir E. Coke, Spelman, Gloss v. Justiciarius.) In many of the old reports, the resolutions of the Judges are said to have been made "ad mensam," sometimes "after dinner at Serjeants' Inn." The Pervyse is mentioned in Chaucer—

> A Serjeant of the law both ware and wise
> That often had yben at the Porvyse.
> *Prol. Cant. Tales.*

Selden considers the term to have an Oxford origin, being a corruption of Parvas, a name by which the scholars' afternoon exercises were called, to distinguish them from the greater exercises of the Regent Masters. (See also Spelman v. Parvæ; on the Pervyse of Pawle's, Reeves, c. 30, from a Manuscript of the time of Hen. VIII.) In the Preface to the second Report, Coke

disgust; if you can satisfy my doubts in this particular, I will cease to importune you with any more queries. It is

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descants on the prosperity of families who have arisen from the profession of the law: and he there refers to a passage of Scripture which is cited by Fortescue. (And see Philipps's Grandeur of the Law; Popham, 44; Bacon's Works, Speech on taking his place in Chancery; Lord Thurlow's Reply to the Duke of Grafton in Butler's Reminiscences. See also concerning the dignity of Peerage, as connected with the situation of the Chief Justices of the King's Bench, and of the pleas, Considerations on the Law and Lawyers, published A. D. 1788.)

The History of this country unhappily affords several exceptions to the encomium passed by Fortescue upon the inviolate integrity of the Bench. The ancient book, entitled the Mirror of Justices, contains many early examples of judicial delinquency. And the National Justice has fallen with merited severity upon the Judges of Edward I. and of Richard II., upon Thorpe, Dudley, and Empson, Siroggs and Jeffries. (See the Speech of the Archbishop of Canterbury upon the Judges of Edward I., annexed to the Tract called "The Security of Englishmen's Lives;" 2 Inst. "St. de Judaismo;" 3 Inst. "Judicium de corrupto judice;" and Lord Somers on Grand Juries, p. 223. et seq. On Judicial Bribery, 2 Inst. 145 et seq.; Selden's Diss. ad Fletam, "on the name of Fleta." On the Judges of Rich. II., Petyt. Jus. Parl., p. 182, 3 Inst. 22; Barrington on 20 Rich. II. Respecting Jeffries, Sheffield, D. of Buckinghamshire's Thoughts on the Revolution. Concerning the Judges of Edw. VI., Burnet on the Reformation, Vol. II.; K. Edw. Rem., p. 72; King Edw. Journal, ibid., pp. 55, 56; Latimer's Sermons before the King; Paston Letters, Vol. III., Lett. 2; and see the State Trials.) Lord Bacon says that Henry VII. used to boast of governing England by his laws, and his laws by his lawyers: And Andrew Marvel exclaims with great truth against the Judges appointed by the Stuarts, "that what French counsel, what standing forces, what parlia-

objected, that the Laws of England admit of great delays in the course of their proceedings, beyond what the

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mentary bribes, what national oaths, and all the other machinations of wicked men had not been able to effect, was more compendiously acted by twelve men in scarlet." It would have been gratifying, if history had not recorded even a solitary instance of judicial corruption, occurring since the Revolution: and every admirer of genius, every friend to the advancement of science, and the improvement of rational man, must deeply lament to find the name of Bacon in the list of Judges who have betrayed the public confidence. The moral lesson which ought to be derived from his fall, he has himself read to us. "Hereafter," he says, in his speech to the Peers, "the greatness of a Judge or magistrate shall be no sanctuary or protection of guiltiness, which, in a few words, is the beginning of a golden world: the next is, that after this example, it is like that Judges will fly from any thing that is in the likeness of corruption, though it were at a great distance, as from a serpent, which tendeth to the purging of Courts of Justice, and the reducing them to their true honor and splendor, and in these points God is my witness that, though it may be my fortune to be an anvil whereupon these good effects are beaten and wrought, I take no small comfort." (Hargr. St. Tr., Vol. II., and see Lord Bacon's numerous Letters respecting his own case, also North American Review, No. 39, and particularly respecting the inducements held out to Lord Bacon by King James, to prevail upon him to waive his defence, a piece called an Abridgment of Bacon's Philosophical Theory, in the Appendix of a work entitled Mineral Productions, written by Bushel, a person in Lord Bacon's service, and cited in the American Review.) It is consoling to turn from this melancholy example of human frailty in the wisest and greatest of mankind, to a venerable list of English Judges, who have left behind them the brightest reputation for excellence, in every human virtue. At the head of these illustrious characters stands Sir Thomas More,

laws of any other country allow of: this is not only an obstruction to Justice, but often an insupportable expense

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conspicuous for his scrupulous anxiety to avoid whatever might wear the least semblance of a bribe. Neither has posterity held in less honor the name of Sir Matthew Hale, distinguished for the high independence of his public life, and his irreproachable integrity during the worst of times; who kept the tribunals of justice, over which he presided, undefiled, under the government of a flagitious King, and of a tyrannical Commonwealth.

The perfect judicial character has been sketched more than once, by the hand of a master. Lord Bacon, in his Essay on Judicature, considers the duties of a Judge with reference to the parties that sue, the advocates that plead, the clerks and ministers of Justice underneath them, and the sovereign State above them. In a speech to Justice Hutton, on his being called to be one of the Judges of the Common Pleas, many admirable rules are laid down for the direction of his conduct. And in a letter which Lord Bacon wrote to the Duke of Buckingham, and which is published in the Cabala, he communicates some valuable remarks respecting the selecting of Judges. Neither is the portraiture of the judicial character described in a more degenerate tone of feeling by Lord Commissioner Whitelocke, in his speeches to the parliamentary Judges, during the time of the Commonwealth. (Whitel. Mem., pp. 344, 392. See also Lord Bacon's Speeches to Sir J. Denham, and to Sir W. Jones, and to the Judges before the Summer Circuit; and see Hobbes's Leviathan, c. 26; Preface to the fourth Report; Letter of Lord Burleigh on the Choice of Judges, Peck's Desid. Cur., Vol. I., p. 182; Moore's Rep., p. 116; Cancellor Bromley's Opinion on the Requisites to be observed by Judges in Judgments on Demurrers, and Trials by Verdict; Speaker Onslow's Opinion of Lively Judges, Burnet, Vol. V., p. 432.) A few traits may here be mentioned: Lord Bacon says, "If any one sue to be made a Judge, for my own part,

to the parties who are at law; especially in such actions where the demandant is not entitled to his damages.

I should suspect him." "Let not a Judge meet a cause half way, nor give occasion to the party to say, his counsel or proofs were not heard." Judge Hutton is advised to be "a light to jurors to open their eyes, but not a guide to lead them by the noses; that he should not affect pregnancy and expedition, by an impatient and catching hearing of the Counsellors at the bar." So, in the Essay on Judicature, Lord Bacon says, "Patience and gravity of hearing is an essential part of Justice, and an overspeaking Judge is no well-tuned cymbal: it is no grace to a Judge first to find that which he might have heard in due time from the bar; or to shew quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, although pertinent. Judges ought to be more learned than witty, more reverend than plausible, more advised than confident. Above all things, integrity is their portion and proper virtue." In a speech to the Judges, previous to the circuits, Lord Bacon declares that "a popular Judge is a deformed thing, and plaudites are fitter for players than for magistrates." In the letter in the Cabala, it is said that "an ignorant man can not, a coward dare not, be a good Judge." An examination of the references which have been noticed, will not fail to convince the reader of the very different, perhaps the contrasted talents, which distinguish a favorite advocate and a great Judge. Churchill has drawn a picture no less just than spirited, of that odious character, an advocate on the Bench.

————— "Who may enlarge, retrench,
Create and uncreate, and on the Bench
With winks, smiles, nods, and such like paltry arts
May work and worm into a Jury's hearts:
Or baffled there, may, turbulent of soul,
Cramp their high office and their rights controul.
Who may, though Judge, turn advocate at large,

Chap. LIII.—*The Chancellor's Answer.*

Chancellor. In personal actions, which do not arise within the cities and trading towns (where they proceed according to usages and liberties of their own), the proceedings are in the ordinary way. Though they admit of great delays, yet they are not so excessive. Indeed, in cities and towns, especially when the necessity of the case so requires, the process is speedy, as it is likewise in other parts of the world. But neither yet are the proceedings hurried on too fast (as it sometimes happens in other countries), by means whereof one or other of the parties is a sufferer. In real actions, almost every where, the pro-

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And deal replies out by the way of charge;
Making interpretation all the way
In spite of facts his wicked will obey.
And leaving law without the least defence,
May damn his conscience to approve his sense."

The demeanor of a Judge off the Bench, and in the circles of private life, is subject to the same observations which Bolinbroke has made upon a patriot King, when not in the immediate exercise of his august functions. This part of the Judicial character has been touched upon, with great felicity, by that distinguished Judge, Sir H. Grimston, when, with a view to pass a high panegyric upon his deceased friend and preceptor Croke, he applies to him a passage from Tacitus, in which that historian describes the manners of Agricola: "Tempora curarum remissionumque divisa; ubi conventus ac judicia poscerent, gravis, intentus, severus, et sæpius misericors: ubi officio satisfactum, nulla ultra potestatis persona; tristitiam et arrogantiam exuerat; nec illi, quod est rarissimum, aut facilitas auctoritatem, aut severitas amorem diminuit."

cess goes on slow and tedious; but in England it is more expeditious. There are in France, in the Supreme Court of Parliament, some causes, which have been depending upwards of thirty years. I myself know a case of appeal prosecuted in the said Court, which has been depending now these ten years, and it is likely will be so for ten years more before it can be decided. While lately at Paris, my host shewed me his process in writing, which had been before the Court of Parliament for eight years, for four French Sols rent, which, of our money, makes but *eight pence*, and he had no prospect of obtaining judgment in less than eight years more. I have known other cases of the same nature: and for what appears to me, the Laws of England do not admit of so great delays as the Laws of France. But it is really necessary there should be delays in legal proceedings, provided they be not too dilatory and tedious. By these means the parties, in particular the party prosecuted, is better provided with his proper defence, and advice of counsel, which otherwise neither of them could be, either to prosecute or defend. "Judgment is never so safe when the process is hurried on." I remember once at an assizes and gaol-delivery at Salisbury, that I saw a woman indicted for the death of her husband, within the year: she was found guilty, and burnt for the same; in this case the Judge of assize, after the whole proceedings before him were over, might have respited the execution of the woman, even after the expiration of the year. At a subsequent assizes I saw a servant of the man who was so killed, tried and convicted before the same Judge for the same murder: who made an ample public confession that he was the only person who was guilty of the said fact, and that his mistress, who had been executed, was entirely innocent of it: wherefore he was drawn and hanged, and at the time and

place of his execution he lamented the case of his poor mistress, upon account of her innocence, and her being in no wise privy to her husband's death. The fact being thus, how may we suppose the Judge to be affected with a sense of conscience and remorse for being so hasty in awarding judgment of execution, when it was in his power to have stayed for some time, further process against her: he often owned to me, with concern, that he should never be able to satisfy it to his conscience for such his precipitate behaviour. Deliberation often brings judgment to maturity, which seldom or never happens where the proceedings are too much hurried on. Wherefore the Laws of England admit of Essoins, a sort of practice not known in the laws of other countries. Are not the Vouchings to Warranty of some use? The same may be said of the Aids of those to whom the reversion of lands belongs, who bring the title in question, and who have in their custody the evidences to make out the title of the lands. The same may be said of Coparceners, who are to restore in proportion, if the estate allotted to one of them should be evicted: and yet these are all delays, as I have formerly informed you: even delays of this kind the laws of other countries do not allow: neither do the Laws of England favour such delays and imparlances as are frivolous and vexatious. And if, at any time, delays happen in pleading, which are found to be mischievous and inconvenient, they may be abolished, or reformed, in every Parliament; nay, and all other laws used in England, where they do not answer the intention, or labour under any defect, may be corrected and amended in Parliament. So that all the Laws of England, you will conclude from what has been said, must needs be very good, either in fact or possibility. They are either such already, or are easily capable of being made such.

And to this the kings of England are obliged, in virtue of a solemn oath taken at their coronation, as often as the necessity or equity of the case shall so require.[1]

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[1] This part of Fortescue's Treatise is quoted in the Preface to the eighth Report, in which Coke expresses the resolution of the Court to discountenance all unnecessary delays, which he calls the device of the devil. In the second Institute he repeats in several places a rule for the construction of Statutes which accelerate the progress of causes, that they are to be construed liberally for effectuating that purpose. In Lord Chancellor Bromley's speech to C. J. Anderson, which is given in Moore's Reports, the oppressions arising from delay in judicial proceedings are enumerated: and the Chancellor concludes by declaring that he who prosecutes his right would rather have a speedy judgment against him, than a tardy one with him. A Court was established in the Reign of Edward III. for redressing delays in judgments; a particular account of which Court is given in the fourth Institute. In the second Institute is found a multitude of statutory provisions in restraint of the abuses arising from the doctrine of essoins, vouchers, aids, and demur of parol. (See particularly 2 Inst. 411; and Jehu Webb's Case, 8 Rep., the Reasons for Calling the Assize "Festinum Remedium." On fourching by essoin, 2 Inst. 250. Concerning the Justices of Trailbaston, 2 Inst. 540; Spelman's Gloss. v. Trailbaston. On the Antiquity of Essoins, Hickes. d. e., p. 8, and Beame's Glanville, lib. i., c. 6 et seq. On the Essoin de malo lecti and licentia surgendi, Regist. Orig., fol. 8 and 9; Selden, Hengham, Magna, n. 37, Case of the Abbot of Crowland, who lost his seisin, because after being essoined de malo lecti, when the four Knights were coming to inspect him, he rose to go to the Court, and the Knig hts didnot find him in bed.) There were two species of delay common in Courts of Justice, which deserve attention as they respect the prerogative of the Crown; the first of these is the Writ "de Rege Inconsulto," which Coke informs us was often used for the purpose of

Chap. LIV.—*Conclusion.*

Prince. I am perfectly convinced from the whole tenor of your discourse, that the Laws of England are not only

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delay. (2 Inst. 269, 261; Fitz. N. B. 153; Hardr. 427; Tremaine's P. C. 684; Bacon's Letters; Lord Ellesmere's Speech on the Appointment of Montague, who succeeded Sir E. Coke; Moore's Rep. 828.) The other is the Writ of Protection which was a greater cause of delay than even the Essoin. Queen Elizabeth discountenanced the granting of protections in a manner highly honorable to her character; they have been the subject of judicial decision since the Revolution, in the case of Lord Cutts. (Reeves's Henry VI., Co. Litt. 138, and Hargr. Note, ibid.; 2 Inst. 56; 3 Lev. 332; Barr. on 12 Edw. II., sec. 2.) Spelman has traced with great learning the origin of our law terms and of the rules by which the intervals between the steps in the proceedings of a cause are regulated; many of which had their foundation in the superstitions of the Romish Church. (See also Herne's Cur. Disc., several Tracts upon Terms; Wynne's Eunomus; 2 Inst. 64.) With respect to delays in the prosecution of capital offences, the wise and humane caution of Fortescue is repeated by Sir E. Coke and Sir M. Hale, who relate several melancholy instances arising within their own experience, which, like the one cited in the text, exhibit the baneful effects of a precipitate execution of justice in criminal matters: On such occasions the Judge should be actuated by the sentiment in the passage of antiquity according to the sense in which it was frequently adopted by Lord Somers, "De morte hominis nulla est cunctatio longa." Lord Bacon had, to use his own expression, "somewhat of the cunctative," and the Motto which Hale put on the head of his Staff was "festina lente." (See further concerning Delays in Law, Pref. to Sir J. Davis's Reports; Dowman's Case, 9 Rep.; Harl. Misc., Vol. VIII., p. 414.)

good, but the best of laws for the particular Constitution of England. And if at any time some of them want amendment, it may be easily done by application to, and in the way of Parliament: so that the kingdom either really is, or is easily capable of being governed by the best of laws: and I am of opinion that the points you have advanced in this discourse, and the just encomium you have given our laws, may be of some use to those who shall be hereafter kings of England: since no king can govern with pleasure by such laws as he is not pleased with, or does not rightly apprehend. "The unfitness of a tool disgusts the mechanic: and the bluntness of the lance or spear makes a dastardly soldier." But as a soldier is animated to the battle when his arms are good, and himself expert in using them, according to Vegetius, who says, "that knowledge and experience in war breed and beget courage: and no one is afraid to do what he knows he can do well:" so a king is animated and encouraged to do justice when the laws by which it is administered, are reasonable and just, and he has a sufficient knowledge of and experience in them. A general knowledge is sufficient for him, leaving it to his Judges to have a more exact and a more profound skill in them. So, Vincentius Belvacensis, in his book of Moral Institution of Princes, says, "that every Prince ought to have a general knowledge of the Holy Scriptures," which say, "that vain are all they in whom there is not the knowledge of God the Most High:" and it is written in the Proverbs, "Let knowledge be in the lips of the king, and his mouth shall not err in judgment." Yet a Prince is not obliged to so critical an understanding of the Scriptures; such as may become a Professor in Divinity; a general insight and acquaintance with them, as with the laws, is all that is necessary and required of him. Such

had Charlemaine; such had Lewis his son; such had Robert, sometime king of France, and who was author of this conclusion ("Sancti spiritus adsit Nobis Gratia"), and many others, as the said Vincentius, in the 15th chapter of the same book, evidently shews. Wherefore the doctors of the laws do say, that "an emperor carries all his laws in the cabinet of his own breast." Not that he really and actually knows all the laws, but as he apprehends the principles of them, their method and nature, he may properly enough be said to understand them all. Moreover, he has it in his power to alter or abrogate them: so that all the laws are in him potentially, as Eve was in Adam before she was formed. But since, my good Chancellor, you have now performed what you undertook at first, and have fully persuaded me to apply myself to the study of the laws of my country, I will no longer detain you on this subject. But, I now earnestly desire, that you will proceed, as you have formerly begun with it, to instruct me in the principles, method and nature of the Law of England: which law, I am resolved, shall be ever dear to me, preferably to all other laws in the world, which it as far surpasses, as the morning star exceeds the other stars in glory and brightness. Since the intention is answered wherewith you were moved to this conference, time and reason require that we put an end to it. Rendering all due thanks and praise to Him who enabled us to begin, to carry on and finish it; even Alpha and Omega, the beginning and the end, the first and the last; and "let every thing that hath breath praise the Lord." *Amen.*

THE LATIN TEXT

— OF —

De Laudibus Legum Angliæ,

FROM THE MSS. IN THE

UNIVERSITY LIBRARY, CAMBRIDGE.

Collated with the First Printed Edition.

INTRODUCTIO MATERIE.

Seviente dudum in regno Anglie nefandissima rabie illa qua piissimus ibidem Rex Henricus sextus, cum Margareta Regina consorte sua, filia Regis Jerusalem et Cicilie, ac eorum unigenito Edwardo principe Wallie, inde propulsi sunt, sub qua et demum Rex ipse Henricus a subditis suis deprehensus carceris diutinum passus est horrorem. Dum Regina illa cum sobole sua, patria sua sic extorres, in Ducatu Barreni predicti Regis Jerusalem dominio morabantur. Princeps ille, mox ut factus est adultus, militari totum se contulit discipline, et sepe ferocibus et quasi indomitis insedens caballis, eos calcaribus urgens, quandoque lancea, quandoque mucrone, aliis quoque instrumentis bellicis, sodales suos, juvenes sibi servientes bellancium more invadere, ferireque, juxta martis gimnasii rudimenta, delectabatur. Quod cernens miles quidam grandevus, predicti Regis Anglie Cancellarius, qui eciam ibidem sub eadem clade exulabat, Principem sic affatur.

Cap. I.—*Et hic Cancellarius Primo Movet Principem ad disciplinam Legis.*

Gaudeo vero, serenissime Princeps, super nobilissima indole tua, videns quanta aviditate militares tu amplecteris actus; convenit namque tibi taliter delectari, nedum quia miles es, sed amplius quia Rex futurus es. Regis namque officium pugnare est bella populi sui, et eos rectissime judicare, ut Primo Regum VIII. Capitulo clarissime tu doceris. Quare ut armorum utinam et legum studiis simili zelo te deditum contemplarer, cum ut armis bella, ita legibus judicia peregantur. Que Justinianus Augustus, equissima librans mente, in initio prohemii libri sui Institutionum ait Imperiam majestatem non solum armis decoratam, sed et legibus oportet esse armatam, ut utrumque tempus bellorum et pacis recte possit gubernare. Tamen, ut ad legum studia fervide tu anheles, maximus Legislator ille Moises, olim Synagoge Dux, multo forcius Cesare te invitat, dum Regibus Israel divina autoritate ipse precipiat eorum leges legere omnibus diebus vite sue, sic dicens: "Postquam sederit Rex in solio regni sui, describet sibi Deuteronomii leges in volumine, accipiens exemplar a sacerdotibus Levitice tribûs, et habebit secum legetque illud omnibus Diebus vite sue, ut discat timere Dominum Deum suum, et custodire verba et ceremonias ejus, que in Lege scripta sunt," (Deuteron. capit. xvii.) Quod exponens Helynandus dicit, "Princeps ergo non debet juris ignarus esse, nec pretextu militie legem permittitur ignorare." Et post pauca, "A sacerdotibus Levitice tribûs assumere jubetur exemplar Legis, id est a viris catholicis et literatis." Hec ille. Liber quippe Deut. omnii est liber legum, quibus Reges Israel subditum sibi populum regere tenebantur.

Hunc librum legere jubet Moses Reges, ut discant timere Deum, et custodire ejus mandata que lege scripta sunt. Ecce timere Deum effectus est legis, quem non consequi valeret homo, nisi prius sciat voluntatem Die, que in lege scripta est. Nam principium omnis famulatûs, est scire voluntatem Domini cui servitur. Legis tamen lator Moises primo in hoc edicto effectum legis, videlicet, timorem Dei commemorat: deinde ad custodiam cause ejus, videlicet, mandatorum Dei ipse invitat. Nam effectus prior est quam causa in animo exhortantis. Sed quis est timor ille quem promittunt leges observatoribus suis? vere non est Timor ille, de quo scribitur quod perfecta charitas foras mittit timorem. Timor tamen ille, licet servilis, sepe ad legendum leges Reges concitat, sed non est ipse proles legis. Timor vero, de quo hic loquitur Moises, quem et pariunt leges, est ille de quo dicit Propheta: "Timor Domini sanctus permanet in seculum seculi;" Hic filialis est et non novit penam, ut ille qui per caritatem expellitur. Nam iste a legibus proficiscitur, que docent facere voluntatem Dei, quo ipse penam non meretur. Sed gloria Domini est super metuentes eum, quos et ipse glorificat. Timor autem iste timor ille est, de quo Job, postquam multipharie sapienciam investigaverat, sic ait: "Ecce Timor Domini, ipse est sapiencia, et recedere a malo intelligencia." (Job cap. xxviii.) Recedere a malo, quod intelligencia Timoris Dei est, leges docent, quo et timorem hunc ipse parturiunt.

Cap. II.—*Replicacio Principis ad motum Cancellarii.*

Hec ut audivit Princeps erecto in senem vultu, sic loquutus est. Scio, Cancellarie, quod Liber Deuteronomii, quem tu commemoras, sacre Scripture volumen est; leges

quoque et ceremonie in eo conscripte sacre sunt, a Domino edite, et per Moisen promulgate: quare eas legere sancte contemplacionis dulcedo est. Sed lex, ad cujus scienciam me invitas, humana est, ab hominibus edita, tractans que terrena; quo, licet Moises ad Deuteronomii lecturam reges Israel astrinxerit, eum per hoc reges alios ad consimiliter faciendum in suis legibus concitasse, omnem effugit racionem, cum utriusque lecture non sit eadem causa.

Cap. III.—*Hic Cancellarius fortificat motum suum.*

At Cancellarius, scio (inquit) per hec que jam objicis, Princeps clarissime, quanta advertencia exhortacionis mee tu ponderas qualitatem, quo me non infime concitas super inceptis nedum clarius, sed et profundius quodammodo tecum disceptare. Scire igitur te volo, quod non solum Deuteronomii leges, sed et omnes leges humane sacre sunt; quo lex sub hiis verbis definitur: Lex est sancio sancta, jubens honesta, et prohibens contraria: sanctum etenim esse oportet, quod esse sanctum definitum est. Jus eciam describi perhibetur, quod illud est ars boni et equi, cujus merito quis nos sacerdotes appellat. Sacerdos enim, quasi sacra dans, vel sacra docens, per Ethimologiam dicitur, quia ut dicunt, jure leges sacre sunt, quo eas ministrantes et docentes Sacerdotes appellantur. A Deo eciam sunt omnes leges edite, que ab homine promulgantur. Nam cum dicat Apostolus, quod omnis potestas a Domino Deo est, leges ab homine condite, qui ad hoc a Domino recipit potestatem, eciam a Deo constituuntur, dicente Auctore Causarum: "Quicquid facit causa secunda, facit et causa prima, alciori et nobiliori modo." Quare Josaphat, Rex Juda, ait judicibus suis, "Judicia, que vos profertis, judicia Dei sunt," (secundo Paralipo. XIX. Capit.) Ex quibus erudi-

ris, quod leges, licet humanas, addiscere est addiscere leges sacras et ediciones Dei; quo earum studium non vacat a dulcedine consolationis sancte. Nec tamen, ut tu cognoscis, dulcedo hujusmodi causa fuit cur Moises Reges Israel Deuteronomion legere preceperat. Nam Causa hec non plus Reges quam Plebeos ad ejus lecturam provocat, nec plus Deuteronomii librum, quam alios Pentateuchi libros legere pulsat causa ista, com non minus libri illi, quam Deuteronomium, sacris habundant carismatibus, in quibus meditari per sanctum est. Quare non aliam fuisse causam mandati hujus, quam quia in Deuteronomio plus quam in aliis libris Veteris Testamenti, leges inseruntur quibus Rex Israel populum regere obnoxius est, ejusdem mandati circumstancie manifeste nos informant. Quo, et te, Princeps, eadem causa non minus quam reges Israel exhortatur, ut legum, quibus populum in futurum reges, tu sis solers indagator. Nam, quod regi Israel dictum est, omni regi populi videntis Deum, tipice dictum fuisse intelligendum est. An tunc convenienter utiliterque proposui tibi mandatum regibus Israel latum, de eorum lege addiscenda? cum nedum ejus exemplum, sed et ejus auctoritas figuralis, te erudiunt et obligant ad consimiliter faciendum de legibus regni, quod annuente Domino hereditaturus es.

Cap. IV.—*Hic probat principem per leges posse felicem et beatum.*

Non solum ut Deum timeas, quo et sapiens eris, Princeps colendissime, vocant te leges, cum Propheta dicente "Venite filii audite me, timorem Domini docebo vos:" sed eciam ut felicitatem, beatitudinemque (prout in hac vita nancisci poteris) adipiscaris, ipse leges ad earum disci-

plinatum te invitant. Philosophi namque omnes, qui de felicitate tam varie disputabant, in hoc uno convenerunt, viz. quod felicitas sive beatitudo finis est omnis humani appetitus; quare et ipsam summum bonum quidam eorum, appellabant. Peripatetici tamen constituebant eam in virtute, Stoici in honesto, et Epicuri in voluptate. Sed quia Stoici honestum definiebant esse quod bene fit et laudabiliter ex virtute, et Epicuri afferebant nichil esse voluptuosum sine virtute, omnes secte ille, ut dicit Leonardus Aretienus, Ysagogico Moralis Discipline, id hoc concordarunt, quod sola virtus est, que felicitatem operatur. Quo et Philosophus in vii Politicorum (felicitatem definiens,) dicit, quod ipsa est perfectus usus virtutum. Hiis jam presuppositis, considerare te volo eciam ea que sequentur. Leges humane non aliud sunt quam regule, quibus perfecte justicia edocetur. Justicia vero, quam leges revelant, non est particularis illa, que commutativa vel distributativa vocatur, seu alia quevis particularis virtus, sed est virtus perfecta, que justicie legalis nomine designatur. Quam Leonardus predictus ideo dicit esse perfectam, quia omne vicium ipsa eliminat, et omnem virtutem ipsa docet: quo et omnis virtus ipsa merito nuncupatur. De qua Omerus dicit, similiter et Philosophus quinto Ethicorum, quod ipsa est preclarissima Virtutum, et nec Lucifer, nec Hesperus, ut illa, est admirabilis. Justicia vero hec subjectum est omnis regalis cure, quo sine illa Rex juste non judicat, nec recte pugnare potest. Illa vero adepta perfecteque servata, equissime peragitur omne officium Regis. Unde cum perfectus usus virtutum sit felicitas, et justicia humana, que non nisi per legem perfecte docetur, nedum sit virtutis effectus, sed et omnis virtus: sequitur, quod justicia fruens felix per legem est, quo et per eam ipse fit beatus, cum idem sit beatitudo

et felicitas in hac fugaci vita, cujus et per justiciam ipse summum habet bonum. Tamen non nisi per gratiam lex poterit ista operari, neque legem aut virtutem sine gratia tu addiscere poteris, vel appetere. Cum, ut dicit Parisiensis in Libro suo de Cur Deus Homo, virtus hominis appetitiva interior per peccatum originale ita viciata est, ut sibi viciorum suavia, et virtutum aspera opera sapiant. Quare, quod aliqui ad amorem, sectationemque virtutis se conferunt, divine bonitatis beneficium est, et non humane virtutis. Num tunc leges, que preveniente et comitante gratia, omnia premissa operantur, toto conamine addiscende sunt? Dum felicitatem, que secundum Philosophum est finis et complementum humani desiderii, earum apprehensor obtinebit, quo et beatus ille erit in hac vita, ejus possidens summum bonum. Vere, etsi non hec te moveant, qui regnum recturus es, movebunt te et arctabunt ad disciplinam legis Prophete verba dicentis: "Erudimini qui judicatis terram:" non enim ad erudicionem artis factive, aut mechanice, hic movet Propheta: Cum non dicat, erudimini, qui colitis terram, nec ad erudicionem sciencie tantum theorice, quamvis opportuna fuerit incolis terre, quia generaliter non dicit, erudimini qui inhabitatis terram, sed solum ad disciplinam legis, qua judicia redduntur, Reges invitat Propheta in hiis verbis, cum specialiter ipse dicat, "Erudimini qui judicatis terram." Et sequitur, "Ne quando irascatur Dominus, et pereatis de via justa." Nec solum legibus, quibus justiciam consequeris, Fili Regis imbui te jubet sacra Scriptura, sed et ipsam justiciam diligere tibi alibi precipit, cum dicat, "Diligite justiciam qui judicatis terram." (Sapientie capitulo primo.)

Cap. V.—*Hic probat quod legis ignorancia causat contemptum ejus.*

Sed quomodo justiciam diligere poteris, si non primo legum scienciam, quibus ipsa cognoscatur, utcunque apprehenderis? Dicit namque Philosophus, quod nichil amatum nisi cognitum. Quare Fabius Orator ait, "Quod felices essent artes si de illis soli artifices judicarent." Ignotum vero non solum non amari, sed et sperni solet. Quo poeta quidam ait,

Omnia que nescit, dicit spernenda colonus.

Et non coloni solum vox hec est, sed et doctorum peritissimorum. Nam si ad Philosophum Naturalem, qui in mathematica nunquam studiut, Methafisicus dicat quod sciencia sua considerat res separatas ab omni materia et motu secundum esse et secundum racionem: vel Mathematicus dicat, quod sua sciencia considerat res conjunctas materie et motui, secundum esse, sed separatas secundum racionem: ambos hos, licet philosophos, Philosophus ille Naturalis, qui nunquam novit res aliquas separatas a materia et motu, essencia vel racione, spernet, eorumque sciencias, licet sua sciencia nobiliores, ipse deridet, non alia ductus causa, nisi quia eorum sciencias ipse penitus ignorat. Sic et tu, Princeps, legis Anglie peritum miraberis, si dicat, quod frater fratri sibi nequaquam uterino non succedet in hereditate paterna, sed pocius Hereditas illa sorori integri sanguinis sui descendet, aut capitali domino feodi accidet ut escheta sua; cum causam hujus legis tu ignoras, in lege tamen Anglie doctum hujus casus difficultas nullatenus perturbat. Quare et vulgariter dicitur quod Ars non habet inimicum nisi ignorantem.

Sed absit a te, Fili Regis, ut inimiceris legibus regni, quo tu successurus es, vel ut eas spernas, cum justiciam quam leges revelant diligere predicta Sapientie lectio te erudiat. Iterum igitur atque iterum, Princeps inclytissime, te adjuro, ut legis regni Patris tui, cui successurus es, addiscas; nedum ut inconveniencias has tu evites: sed quia mens humana, que naturaliter bonum appetit, et nihil potest appetere, nisi sub racione boni, mox ut per doctrinam bonum apprehenderit, gaudet et illud amat, ac quanto deinceps illud plus recordatur, tanto amplius delectatur in eodem, quo doceris quod si leges predictas, quas jam ignoras, intellexeris per doctrinam, cum optime ille sint, amabis eas; et quanto plus easdem mente pertractaveris, tanto eisdem delectabilius tu frueris.

Nam omne, quod amatur, usu trahit amatorem suum in naturam ejus. Unde, ut dicit Philosophus, "usus altera fit natura." Sic ramunculus piri stipiti pomi insertus, postquam coaluerit, ita pomum trahit in naturam piri, ut ambe deinceps merito pyrus appellentur, fructusque producant piri. Sic et usitata virtus habitum generat, ut utens ea deinde a virtute illa denominetur, quo modestia preditus, usu modestus nominatur, continentia continens, et sapientia sapiens. Quare et tu, Princeps, postquam justicia delectabiliter functus fueris, quo eam indueris in habitum, merito legis denominaberis Justus, cujus rei gratia tibi dicetur, "Dilexisti justiciam, quo et odisti iniquitatem, propterea unxit te Dominus Deus tuus oleo letitie pre consortibus tuis regibus terre."

CAP. VI.—*Hic epilogat Cancellarius tocius persuasionis sue effectum.*

NONNE tunc, Princeps serenissime, hec te satis concitant

ad legis rudimenta? cum per eam justiciam induere valeas; quo et appellaberis Justus, ignorancie quoque legis evitare poteris ignominiam, ac per legem felicitate fruens, beatus esse poteris in hac vita, et demum filiali timore indutus, qui Dei sapientia est, caritatem, que amor in Deum est, imperturbatus consequeris; qua Deo adherens per Apostoli sentenciam "Fies unus Spiritus cum eo."

Sed quia ista, sine gratia, lex operari nequit, tibi illam super omnia implorare necesse est; Legis quoque Divine et Sanctarum Scripturarum indagare scienciam tibi congruit.

Cum dicat Scriptura Sacra, quod "Vani sunt omnes, in quibus non subest scientia Dei." (Sapientie, Cap. XIII.)

His igitur, Princeps, dum adolescens es, et anima tua velut tabula rasa, depinge eam, ne in futurum ipsa figuris minoris frugi delectabilius depingatur. Quia etiam, (ut Sapiens quidam ait,)

"Quod nova testa capit, inveterata sapit."

Quis artifex tam negligens profectus sue prolis est, ut non eam, dum pubescit, artibus instruat, quibus postea vite solacia nanciscatur? Sic lignarius faber secare dolabra, ferrarius ferire malleo, filium instruit: et quem in spiritualibus ministrare cupit, literis imbui facit: sic et Principi Filium suum, qui post eum populum regulabit, legibus instrui dum minor est, convenit. Qualiter si fecerint Rectores orbis, mundus iste ampliori, quam jam est, justicia regeretur, quibus, si tu, ut jam hortor, facias exemplum non minimum ministrabis.

CAP. VII.—*Jam Princeps se reddit studio legum, licet quibusdam adhuc scrupulosis inquietetur.*

SILENTE extunc Cancellario, Princeps ipse sic exorsus est: Vicisti me, Vir egregie, suavissima oracione tua, qua et animum meum ardore non minimo legis fecisti sitire documenta. Sed tamen duobus me huc illucque agitantibus, animus ipse affligitur: ut tanquam in turbido mari cimba nesciat quorsum diragere proras. Unum est, dum recolit quot annorum curriculis leges, addiscentes earum studio se conferunt, antequam sufficientem earundem periciam nanciscantur, quo timet animus ipse ne consimiliter ego preteream annos juventutis mee. Alterum est, an Anglie legum vel Civilium, que per orbem percelebres sunt, studio operam dabo. Nam non nisi optimis legibus populum regere licet, eciam ut dicit Philosophus, "Natura deprecatur optima." Quare libenter super hiis, quod tu consulis, auscultarem. Cui Cancellarius. Non sunt hec, Fili Regis, tantis celata misteriis ut deliberacione egeant ingenti, quare quid in hiis michi visum est prodere non differem.

CAP. VIII.—*Cito adquiritur tanta scientia legum quanta principi necessaria est.*

PHILOSOPHUS in primo Physicorum dicit, quod "tunc unumquodque scire arbitramur, cum causas et principia ejus cognoscamus usque ad elementa." Super quem textum Commentator dicit, quod Aristoteles per principia intellexit causas efficientes, per causas intellexit causas finales, et per elementa materiam et formam. In legibus vero non sunt materia et forma, ut in phisicis et compositis. Sed

tamen sunt in eis elementa quedam, unde ipse profluunt, ut ex materia et forma, que sunt Consuetudines, Statuta, et Jus Nature, ex quibus sunt omnia jura regni; ut ex materia et forma sunt queque naturalia; et ut ex literis, que eciam elementa appellantur, sunt omnia que leguntur. Principia autem, que Commentator dicit esse causas efficientes, sunt quedam Universalia, que in Legibus Anglie docti, similiter et mathematici, Maximas vocant: Rhetorici paradoxas: et Civiliste regulas juris. Ipsa revera non argumentorum vi, aut demonstracionibus logicis dignoscuntur, sed ut secundo Posteriorum docetur, inductione, via sensus et memorie adipiscuntur. Quare et primo Physicorum Philosophus dicit, quod "principia non fiunt ex aliis, neque ex alterutris, sed ex illis alia fiunt." Quo primo Topicorum scribitur, quod "unumquodque principiorum est sibi ipse fides." Quare, "cum negantibus ea, dicit Philosophus, non est disputandum" quia ut scribitur VI. Ethicorum, "Ad principia non est racio." Igitur principiis imbuendi sunt, quiqui gliscunt aliquas intelligere facultates. Ex eis etenim revelantur cause finales, ad quas, racionis ductu, per principiorum agnicionem pervenitur; unde, his tribus, viz. principiis, causis, et elementis ignoratis, sciencia, de qua ipsa sunt, penitus ignoratur. Et hiis cognitis, eciam scienciam illam cognitam esse, non determinate tamen, sed in confuso et universali, arbitratur.

Sic legem Divinam nos nosse indicamus, dum Fidem, Caritatem, et Spem, Sacramenta quoque Ecclesie ac Dei Mandati, nos intelligere senciamus; cetera Theologie misteria Ecclesie presidentibus relinquentes. Quare Dominus Discipulis suis ait, "Vobis datum est nosse misterium regni Dei, ceteris autem in parabolis, ut videntes non videant, etc." Et Apostolus dixit, "Non plus sapere quam oportet

sapere." Et alibi, "Non alta sapientes." Sic et tibi, Princeps, necesse non erit misteria legis Anglie longo disciplina rimare, sufficiet tibi, ut in Grammatica tu profecisti, eciam et in Legibus proficias. Grammatice vero perfeccionem, que ex Ethimologia, Ortographia, Prosodia, et Diasentetica, quasi ex quatuor fontibus profluit, non specie tenus induisti, et tamen grammatica sufficienter eruditus es, ita ut merito Grammaticus denomineris. Consimiliter quoque denominari Legista mereberis, si legum principia et causas, usque ad elementa, disciputi more indagaveris. Non enim expediet tibi, propria sensus indagine legis sacramenta scrutari, sed relinquantur illa Judicibus tuis et Advocatis, qui in Regno Anglie Servientes ad Legem appellantur, similiter et aliis juris peritis, quos Apprenticios vulgus denominat: melius et enim per alios, quam per teipsum judicia reddes, quo, proprio ore, nullus regum Anglie judicium proferre usus est; et tamen sua sunt omnia judicia regni, licet per alios ipsa reddantur; sicut et judicium omnium sentencias Josaphat asseruit esse judicia Dei. Quare, tu Princeps serenissime, parvo tempore, parva industria, sufficienter eris in legibus regni Anglie eruditus, dummodo ad ejus apprehensionem tu conferas animum tuum. Dicit namque Seneca in Epistola ad Lucillum, "Nihil est quod pertinax opera, et diligens cura, non expugnat." Nosco namque ingenii tui perspicacitatem, quo audacter pronuncio, quod in legibus illis, licet earum peritia, qualis judicibus necessaria est, vix viginti annorum lucubris adquiratur, tu doctrinam Principi congruam in anno uno sufficienter nancisceris, nec interim militarem disciplinam, ad quam tam ardenter anhelas, negliges; sed ea, recreacionis loco, eciam anno illo, tu ad libitum perfrueris.

Cap. IX.—*Rex politice dominans non potest mutare leges regni sui.*

Secundum vero, Princeps, quod tu formidas, consimili nec majori opera elidetur. Dubitas nempe, an Anglorum legum vel Civilium studio te conferas, dum Civiles supra humanas cunctas leges alias, fama per orbem extollat gloriosa. Non te conturbet, Fili Regis, hec mentis evagatio: Nam non potest Rex Anglie ad libitum suum leges mutare regni sui, principatu namque nedum regali, sed et politico, ipse suo populo dominatur. Si regali tantum ipse preesset eis, leges regni sui mutare ille posset, tallagia quoque et cetera onera eis imponere ipsis inconsultis, quale dominium denotant leges Civiles, cum dicant, "Quod Principi placuit, leges habet vigorem." Sed longe aliter potest rex politice imperans genti sue, quia nec leges ipse sine subditorum assensu mutare poterit, nec subjectum populum renitentem onerare imposicionibus peregrinis, quare populus ejus libere fruetur bonis suis, legibus quas cupit regulatus, nec per regem suum, aut quemvis alium depilatur; consimiliter tamen plaudit populus, sub rege regaliter tantum principante, dummodo in tirannidem ipse non labatur. De quali rege dicit Philosophus III. Politicorum, quod "melius est civitatem regi viro optimo, quam lege optima." Sed quia non semper contingit presidentem populo hujusmodi esse virum, Sanctus Thomas in libro quem regi Cypri scripsit, de Regimine Principum, optare censetur, regnum sic institui, ut rex non libere valeat populum suum tirannide gubernare, quod solum fit, dum potestas regia lege politica cohibetur: Gaude igitur, Princeps optime, talem esse legem regni in quo tu successurus es, quia et tibi, et populo, ipsa securitatem pre stabit non minimam et solamen. Tali lege, ut

dicit idem Sanctus, regulatum fuisset totum genus humanum, si in Paradiso Dei mandatum non preteriisset: tali eciam Lege regebatur Sinagoga, dum sub solo Deo rege, qui eam in regnum peculiare adoptabat, illa militabat; sed demum ad ejus petitionem, rege homine sibi constituto, sub lege tantum regali ipsa deinceps humiliata est. Sub qua tamen dum optimi reges sibi prefuerunt ipsa plausit, et dum discoli ei preessebant ipsa inconsolabiliter lugebat, ut Regum Libre hec distinctius manifestant. Tamen quia de materia ista in Opusculo, quod tui contemplacione de Natura Legis Natura exaravi, sufficienter puto me desceptasse, plus inde loqui jam desisto.

CAP. X.—*Interrogacio Principis.*

TUNC Princeps illico sic ait. Unde hoc, Cancellarie, quod rex unus plebem suam regaliter tantum regere valeat, et regi alteri potestas hujusmodi denegatur? Equalis fastigii cum sint reges ambo, cur in potestate sint ipsi dispares nequeo non admirari.

CAP. XI.—*Renuncio ad alias tractata.*

CANCELLARIUS. Non minoris esse potestatis regem politice imperantem, quam qui ut vult regaliter regit populum suum, in supradicto Opusculo sufficienter est ostensum; diverse tamen autoritatis eos esse in subditos suos ibidem aut jam nullatenus denegavi; cujus diversitatis causam, ut potero, tibe pandam.

CAP. XII.—*Qualitur regna tantum regaliter regulata primitus in choata sunt.*

HOMINES quondam potencia prepollentes, avidi dignitatis et glorie, vicinas sepe gentes sibi viribus subjugarunt, ac

ipsis servire, obtemperare quoque jussionibus suis compulerunt, quas jussiones extunc leges hominibus illis esse ipsi sancierunt. Quarum perpecione diutina, subjectus sic populus, dum per subjicientes a ceterorum injuriis defendebatur, in subjiciencium dominium consenserunt: opportunius esse arbitrantes, se unius subdi imperio, quo erga alios defenderentur, quam omnium eos infestare volencium oppressionibus exponi. Sic que regna quedam inchoata sunt, et subjicientes illi, dum subjectum populum sic rexerunt, a regendo sibi nomen *regis* usurparunt, eorum quoque dominatus tantum regalis dictus est. Sic Nembroth primus sibi regnum comparavit, tamen non *rex* ipse, sed "robustus venator coram Domino" Sacris Literis appellatus est: quia ut venator feras libertate fruentes, ipse homines sibi compescuit obedire. Sic Belus Assirias, et Ninus quam magnam Asie partem dicioni sue subegerunt; sic et Romani orbis imperium usurparunt; qualiter fere in omnibus gentibus regna inchoata sunt. Quare, dum Filii Israel regem postulabant, sicut tunc habuerunt omnes gentes, Dominus inde offensus legem regalem eis per Prophetam explanari mandavit; que non aliud fuit, quam placitum regis eis preessentis, ut in primo Libro Regum plenius edocetur. Habes nunc ni fallor, Princeps, formam exordii regnorum regaliter possessorum. Quare, quomodo regnum politice regulatum primitus erupit eciam propalare conabor, ut cognitis amborum regnorum initiis, causam diversitatis quam tu queris inde elicere tibi facillimum sit.

Cap. XIII.—*Qualiter regna politice regulata primitus inceperunt.*

Sanctus Augustinus, in Libro XIX. de Civitate Dei, Cap. XXIII. dixit quod " populus est cetus hominum, juris consensu et utilitatis communione sociatus." Nec tamen populus hujusmodi dum acephalus, id est sine capite est, corpus vocari meretur. Quia ut in naturalibus, capite detruncato, residuum non corpus, sed truncum appellamus; sic et in politicis, sine capite communitas nullatenus corporatur. Quo primo politicorum dixit Philosophus, quod "quandocunque ex pluribus constituitur unum inter illa, unum erit regens, et alia erunt recta." Quare populum, se in regnum aliudve corpus politicum erigere volentem, semper oportet unum preficere tocius corporis illius regitivum, quem per analogiam in regnis, a regendo *regem* nominare solitum est. Hoc ordine, sicut ex embrione corpus surgit phisicum uno capite regulatum, sic ex populo erumpit regnum, quod corpus extat misticum uno homine ut capite gubernatum. Et sicut in naturali corpore, ut dixit Philosophus, cor est primum vivens, habens in se sanguinem, quem emittit in omnia ejus membra, unde illa vegetantur et vivunt; sic in corpore politico, intencio populi primum viviens est, habens in se sanguinem, viz. provisionem politicam utilitati populi illius, quam in caput et in omnia membra ejusdem corporis ipsa transmittit, quo corpus illud alitur et vegetatur. Lex vero, sub qua cetus hominum populus efficitur, nervorum corporis phisici tenet racionem; quia sicut per nervos campago corporis solidatur, sic per legem, que a *ligando* dicitur, corpus hujusmodi misticum ligatur et servatur in unum, et ejusdem corporis membra ac ossa, que veritatis qua communitas illa susten-

tatur soliditatem denotant, per legem, ut corpus naturale per nervos propria retinent jura. Et ut non potest caput corporis phisici nervos suos commutare, neque membris suis proprias vires, et propria sanguinis alimenta denegare, nec rex, qui caput corporis politici est, mutare potest leges corporis illius, nec ejusdem populi substantias proprias subtrahere, reclamantibus eis aut invitis. Habes ex hoc jam, Princeps, institutionis regni politici formam, ex qua metiri poteris potestatem, quam rex ejus in leges ipsius aut subditos valeat exercere. Ad tutelam namque legis subditorum, ac eorum corporum et bonorum Rex hujusmodi erectus est, et hanc potestatem a populo effluxam ipse habet, quo ei non licet potestate alia suo populo dominari. Quare ut postulationi tue, qua certiorari cupis, unde hoc provenit quod potestates regum tam diversimode variantur, succinctius satisfaciam. Firme conjector, quod diversitates institucionum dignitatum illarum, quas propalavi, predictam discrepanciam solummodo operantur, prout racionis discursu tu ex premissis poteris exhaurire. Sic namque regnum Anglie, quod ex Bruti comitiva Trojanorum, quam ex Italie et Grecorum finibus perduxit, in dominium politicum et regale prorupit: sic et Scotia, que ei quondam ut ducatus obedivit, in regnum crevit politicum et regale. Alia quoque quam plurima regna nedum regaliter, sed et politice regulari, tali origine jus sortita sunt. Unde Diodorus Siculus in secundo libro Historiarum Priscarum de Egipciis sic scribit; "Suam primum Egipcii reges vitam non aliorum regnancium quibus voluntas pro lege est, traducebant licentia, sed veluti privati tenebantur legibus; neque id egre ferebant, existimantes parendo legibus se beatos fore; nam ab hiis, qui suis indulgerunt cupiditatibus, multa censebant fieri, quibus dampna periculaque subirent." Et in quarto

libro sic scribit: "Assumptus in regem Ethiopum vitam ducit statutam legibus, omniaque agit juxta patrios mores, neque premio neque pena afficiens quenquam preter per traditam a superioribus legem." Consimiliter loquitur de rege Saba in felici Arabia, et aliis quibusdam regibus, qui priscis temporibus feliciter regnabant.

Cap. XIV.—*Princeps hic succincte epilogat quod Cancellarius diffusè antea declaravit.*

Cui Princeps; Effugasti, Cancellarie, declarationis tue lumine tenebras quibus obducta erat acies mentis mee, quo clarissime jam conspicio, quod non alio pacto gens aliqua, proprio arbitrio, unquam se in regnum corporavit, nisi ut per hoc se et sua quorum dispendia formidabant, tucius quam antea possiderent; quasi proposito gens hujusmodi fraudaretur, si exinde facultates eorum eripere possit rex suus, quod antea facere ulli hominum non licebat. Et adhuc gravius multo populus talis lederetur, si deinde peregrinis legibus, ipsis forsan exosis, regerentur. Et maxime, si legibus illis eorum minoraretur substancia, pro cujus vitanda jactura, ut pro suorum tutela corporum, ipsi se regis imperio arbitrio proprio submiserunt, non potuit revera potestas hujusmodi ab ipsis erupisse; et tamen si non ab ipsis, rex hujusmodi super ipsos nullam obtineret potestatem. E regione, aliter esse concipio de regno, quod regis solum autoritate et potencia incorporatum est; quia non alio pacto gens talis ei subjecta est, nisi ut ejus legibus, que sunt illius voluntatis placitati, gens ipsa, que eodem placito regnum ejus effecta est, obtemperaret et regeretur. Neque, Cancellarie, a mea hucusque memoria elapsum est, quod alias in tractatu de Natura Legis Nature, horum duorum regum equalem esse potentiam doctis racionibus ostendisti, dum potestas qua

eorum alter perperam agere liber est, libertate hujusmodi non augetur; ut posse languescere morive, potentia non est, sed propter privationem in adjecto, impotentia potius denominandum est. Quia, ut dicit Boecius, "Potencia non est nisi ad bonum;" quo posse male agere, ut potest rex regaliter regnans liberius quam rex politice dominans populo suo, potius ejus potestatem minuit, quam augmentat. Nam sancti spiritus, jam confirmati in Gloria, qui peccare nequeunt, potenciores nobis sunt, qui ad omne facinus liberis gaudemus habenis. Solum michi jam superest a te sciscitandum si lex Anglie, ad cujus disciplinatum me provocas, bona et efficax est ad regimen regni illius, ut lex Civilis, qua sacrum regulatur imperium, sufficiens arbitratur ad orbis regimen universi? Si me in hoc, demonstrationibus congruis, indubium reddideris, ad studium legis illius illico me conferam, nec te postulationibus meis super hiis amplius fatigabo.

Cap. XV.—*Omnes leges sunt jus nature, consuetudines, vel statuta.*

Cancellarius. Memorie tue, Princeps optime, commendasti, que tibi hucusque suggessi, quare et que jam interrogas, meritus es ut pandam. Scire te igitur volo, quod omnia jura humana, aut sunt lex nature, consuetudines, vel statuta, que et constitutiones appellantur. Sed consuetudines, et legis nature sententie, postquam in scripturam redacte, et sufficienti auctoritate principis promulgate fuerint, ac custodiri jubeantur, in constitutionem sive statutorum naturam mutantur, et deinde penalius quam antea subditos principis ad earum custodiam constringunt, severitate mandati illius. Qualis est legum Civilium pars non modica, que a Romanorum principibus in magnis volu-

minibus redigitur, et eorum auctoritate observari mandatur. Unde legis Civilis, ut cetera imperatorum statuta, jam pars illa nomen sortita est. Si igitur in his tribus, quasi omnis juris fontibus, legis Anglie prestantiam probaverim preful-gere, legem illam bonam esse et efficacem ad regni illius regimen eciam comprobavi. Deinde, si eam ad ejusdem regni utilitatem, ut leges Civiles ad imperii bonum, accommodam esse lucide ostenderim, nedum tunc legem illam prestantem, sed et, ut leges Civiles, electam (ut tu optas) eciam patefeci. Igitur hec duo tibi ostendere satagens, sic progredior.

Cap. XVI.—*Lex nature est idem in omnibus regionibus.*

Leges Anglie in his, que ipse sanciunt, legis nature racione non meliores pejoresve sunt in judiciis suis, quam in consimilibus sunt omnes leges ceterarum nationum. Quia, ut dixit Philosophus, V. Ethicorum : "Jus naturale est, quod apud omnes homines eandem habet potestatem," quare de ea amplius disceptare non expedit. Sed quales sunt Anglie consuetudines similiter et statuta, est a modo perscrutandum, et primo consuetudinum illarum visitabimus qualitates.

Cap. XVII.—*Consuetudines Anglie antiquissime sunt, et per quinque naciones vicissim usitate et accepte.*

Regnum Anglie primo per Britones inhabitatum est; deinde, per Romanos regulatum ; iterumque per Britones, ac deinde per Saxones possessum, qui nomen ejus ex Britannia in Angliam mutaverunt. Et tunc per Danos idem regnum parumper dominatum est, et iterum per Saxones, sed finaliter per Normannos, quorum propago regnum

illud obtinet in presenti. Et in omnibus nationum harum et regum earum temporibus, regnum illud eisdem, quibus jam regitur, consuetudinibus continue regulatum est. Que, si optime non extitissent, aliqui regum illorum justitia, ratione, vel affectione concitati eas mutassent, aut omnino delevissent; et maxime Romani, qui legibus suis quasi totum orbis relinquum judicabant. Similiter et alii regum predictorum, qui solum gladio regnum Anglie possiderunt, quo et potentia simili ipsi leges ejus exinanisse valuerunt. Neque enim tantorum temporum curriculis, leges Civiles in quantum Romanorum inveterate sunt, neque Venetorum leges, que super alias antiquitate divulgantur, quorum tum insula, in initio Britonum inhabitata non fuit, sicut nec Roma condita, nec ullorum mundi regnorum deicolarum leges tanto evo inolite sunt. Quare non bonas, immo non optimas esse Anglorum consuetudines, sicut non dicere, ita nec suspicari fas est.

Cap. XVIII.—*Hic ostendit quali gravitate statuta eduntur in Anglia.*

Statuta tunc Anglorum bona sint necne, solum restat explorandum. Non enim emanant illa a principis solum voluntate, ut leges in regnis que tantum regaliter gubernantur, ubi quandoque statuta constituentis procurant commodum singulare, quod in ejus subditorum ipsa redundant dispendium et jacturam: quandoque eciam inadvertentia principum hujusmodi, et sibi consulencium inertia, ipsa tam inconsulte eduntur, quod corruptelarum nomina, pocius quam legum, illa merentur. Sed non sic Anglie statuta oriri possunt, dum nedum principis voluntate, sed et tocius regni assensu, ipsa conduntur, quo populi lesuram illa efficere nequeunt, vel non eorum commodum procu-

rare. Prudencia, eciam et sapiencia necessario ipsa esse referta putandum est, dum non unius, aut centum solum consultorum virorum prudencia sed plusquam trecentorum electorum hominum, quali numero olim Senatus Romanorum regebatur, ipsa edita sunt, ut hii, qui parliamenti Anglie formam, convocationis quoque ejus ordinem et modum noverunt, hec distinctius referre norunt. Et si statuta hec tanta solempnitate et prudencia edita, efficacie tante, quante conditorum cupiebat intencio, non esse contingant, concito reformari possunt ipsa; et non sine communitatis et procerum regni illius assensu, quali ipsa primitus emanarunt. Patent igitur jam tibi, Princeps, legum Anglorum species omnes. Earum quoque qualitates, ut si bone ipse sint, metiri tu poteris prudencia tua, comparatione eciam aliarum legum, et cum nullam tante prestantie in orbe reperies, eas nedum bonas, sed tibi optabilissimas, fore, necessario confiteberis.

Cap. XIX.—*Hic ordinat modum quo Civilium et Anglicarum legum qualitas discerni poterit.*

Solum jam unum de his, quibus agitatur animus tuus, restat explanandum, viz. An, ut Civiles, ita et Anglorum leges, frugi sint et efficaces isti Anglie regno, ut ille imperio, eciam et accommode judicari mereantur. Comparationes vero, Princeps, ut te aliquando dixisse recolo, odiose reputantur; quo eas aggredi non delector; tu, an equalis sint ambe leges meriti, unave altera celsuis preconium mereatur, non ex meo judicio, sed ex his, in quibus earum differunt sentencie, efficacius carpere poteris argumentum. Nam ubi conveniunt leges ambe, equalis laudis ipse sunt; sed in casibus in quibus ipse discenciunt, prestantioris legis preconia

digna pensatione refulgent. Quare casus hujusmodi aliquos jam in medium proferemus, ut que legum illarum eos justius meliusque definiat equa lance valeas ponderare. Et primo, ex casibus maximi ponderis exemplum proponamus.

Cap. XX.—*Casus primus in quo variant leges Civiles et Anglicane.*

Si coram Judice contendentes ad litis perveniant contestationem, super materia facti, quam legis Anglie periti Exitum Placiti appellant, exitus hujusmodi veritas per leges Civiles, testium depositione probari debet, in qua duo testes idonei sufficiunt. Sed per leges Anglie veritas illa non nisi duodecim hominum de vicineto ubi factum hujusmodi supponitur, sacramento, judici constare poterit. Queritur igitur, quis horum duorum processuum tam diversorum rationabilior censeri debeat, et efficacior ad veritatem que sic queritur revelandam; quia lex, que eam cercius meliusque ostendere potest, prestancior in hoc est lege altera, que non tante efficacie est et virtutis. Quare in hujus rei indagine sic procedimus.

Cap. XXI.—*Hic designantur mala que proveniunt ex lege que non alias quam per testes probaciones admittat.*

Per Leges Civiles, pars que in litis contestacione affirmativam dicit testes producere debet, quos ipse ad libitum suum nominabit. Negativa autem probari non potest, videlicet, directe, licet possit per obliquum. Exilis quippe creditur esse potencie, minoris quoque industrie, qui de omnibus quos noscit hominibus duos reperire nequit, ita conscientia et veritate vacuos, ut timore, amore, vel commodo, omni velint contraire veritati. Hos potest tunc ipse in tes-

timonium producere in causa sua. Et si contra eos pars altera dicere velit, vel contra eorum dicta, non semper continget eos, eorum quoque mores aut facta, apud contradicere volentem, agnosci, ut ex eorum feditate et viciis testes illi possit reprobari. Et dum eorum dicta affirmativam contineant, non facile poterunt illa per circumstantias aut obliqua alia improbari. Quis tunc poterit suorum aut sui ipsius, sub lege tali, vivere securus, dum cuilibet sibi inimicari volenti lex tale prestat subsidium? Et qui iniqui duo tam incauti sunt, quo facti, de quo ipsi examinabuntur in judicio, non, antequam in testes producantur, oculte fingant imaginem et figuram, componant quoque eidem omnes circumstantias quales sibi affuissent si illud in veritate constitisset? "Prudentiores namque," ut dixit Dominus, "sunt filii hujus mundi quam filii lucis." Sic Jesabel sceleratissima testes duos, filios Belial, contra Nabot in judicio produxit, quo ipse vitam perdidit, et Achab rex ejus vineam possidebat. Sic duorum senum eciam judicum testimonio, mortua fuisset pro adulterio uxor castissima Susanna, si non eam miraculose liberasset Dominus inexcogitabili prudentia, quam a natura non habuit puer minor, nondum etate provectus. Et si ipsos, depositione sua varia, convicerat puer ille esse falsarios, quis, nisi solus Dominus, novisse poterit eos in dictis suis taliter variaturos? dum, non de arboris natura, sub qua imputatum facinus fiebat, lex aliqua eos artabat reminisci. Quia testes sceleris cujusque considerare non putantur omnia umbracula et cetera vicina illi facto, que ad aggravationem vel deteccionem criminis illius minime operantur. Sed dum de arborum speciebus judices illi nequam ultro deponentes variabant, eorum dicta ipsos veritatis fuisse prevaricatores demonstrabant; quo et talionis penam merito incurrerunt. Nosti et tu, Princeps divine,

qualiter jam tarde Magister Johannes Fringe, qui postquam annis tribus sacerdotali functus est officio, duorum iniquorum depositione, qui eum antea juvenculam quandam affidasse testati sunt, sacrum presbyteratus ordinem relinquere compulsus est, et matrimonium cum femina illa consummare. Cum qua postquam annis quaterdecim moratus, sobolem septimam suscitaverat, demum de crimine lese majestatis in tuam celsitudinem conjurato convictus, subornatos fuisse testes illos, et falsum dixisse testimonium, in mortis sue articulo, coram omni populo fassus est. Qualiter et sepe perverti judicia falsorum testium medio, eciam sub optimis judicibus, non est tibi inauditum, nec incognitum mundo, dum scelus illud (proh dolor!) creberrime committatur.

Cap. XXII.—*Vide hic de inhumanitate torturarum.*

Non igitur contenta est lex Francie in criminalibus ubi mors imminet reum testibus convincere, ne falsidicorum testimonio sanguis innocens condempnetur; sed mavult lex illa reos tales torturis cruciari, quousque ipsi eorum reatum confiteantur, quam testium deposicione, qui sepe passionibus iniquis, et quandoque subornacione malorum, ad perjuria stimulantur. Quali caucione et astucia, criminosi eciam et de criminibus suspecti, tot torturarum in regno illo generibus affliguntur, quod fastidit calamus ea literis designare. Quidam vero in equueleis extendunter, quo rumpuntur nervi, et vene in sanguinis fluenta prorumpunt. Quorundam vero diversorum ponderum pendulis dossolvuntur compagines et juncture. Et quorundam gaggantur ora usque dum per illa, tot aquarum infundantur fluenta, ut ipsorum venter montis tumescant more; quo tunc venter ille, fossorio vel simili percussus instrumento, per os aquam

illam evomet, ad instar balene, que cum halecibus et aliis pisciculis mare absorbuit, aquam despumat ad altitudinem arboris pini. Pudet (proh pudor!) jam penna exquisitorum ad hec cruciatuum enarrare immania; nam eorum veriatus numerus vix notari poterit magna in membrana. Leges eciam ipse Civiles, deficiente testium copia in criminalibus veritatem consimilibus extorquent tormentis. Qualiter et faciunt eciam quamplurima regna. Sed quis tam duri animi est, qui semel ab atroci tanto torculari laxatus, non pocius innocens ille omnia fateretur scelerum genera, quam acerbitatem sic experti iterum subire tormenti, et non semel mori mallet, dum mors sit ultimum terribilium, quam tociens occidi, et totidem Gehennales furias morte amariores sustinere? Et nonne, Princeps, tu novisti criminosum quendam, qui inter tormenta hujusmodi militem nobilem, probum, et fidelem, de prodicione quadam super qua ut asseruit, ipsi duo insimul conjurarunt, accusare, quod et constanter postmodum ipse fecit, a torturis illis relaxatus, ne iterum eadem tormenta subiret; sed demum, cum ex penis illis lesus usque ad mortis articulum infirmaretur, ultimum quoque viaticum, Christi videlicet corpus, sumpsisset, juravit tunc super corpus illud, et per mortem, quam tunc protinus credidit se subiturum, militem illum innocentem fuisse, et immunem de omnibus in quibus eum accusavit; tamen ait penas, in quibus ipse tempore delacionis sue fuerat, ita atroces exstitisse, quod priusquam eas iterum experiretur, eciam eundem militem ille iterum accusaret, similiter et patrem proprium, licet tunc in mortis limine, quam non credidit se posse evadere, fuerit constitutus. Nec vero ipse mortem quam tunc metuit evasit, sed demum suspensus, tempore mortis sue, ipsum militem purgavit ab omni crimine, de quo eum defamavit. Taliter, proh dolor, et quam plures alii

miseri faciunt, ncn veritatis causa, sed solum urgentibus torturis arctati; quid tunc certitudinis resultat ex confessionibus taliter compressorum? Ceterum si innocens aliquis non immemor salutis eterne, in hujusmodi Babylonis fornace, cum tribus pueris benedicat Domino, nec mentiri velit in perniciem anime sue, quo judex eum pronunciat innocentem, nonne eodem judicio judex ille seipsum reum judicat omnis sevitie et penarum, quibus innocentem afflixit? O quam crudelis est lex talis, que dum innocentem dampnare nequit, judicem ipsa condemnat? Vero non lex ritus talis esse perhibetur, sed pocius semita ad Gehennam. O Judex, quibus in scolis didicisti te presentem exhibere dum penas luit reus? Execuciones quippe judiciorum in criminosos per ignobiles fieri convenit; nam earum actores infames solent esse ipso facto, quo et ipsi deinde ad judicialem apicem redduntur indigni. Non enim per angelos, sed per demones, exequi facit Dominus judicia sua, reddita in dampnatos. Nec revera in Purgatorio cruciant animas quamvis predestinatas ad gloriam angeli boni, sed mali. Maligni eciam homines sunt, per quos Dominus in hoc mundo miseris tribuit malum pene. Nam cum dixerat Deus, I. Regum, in capitulo vicessimo secundo, "Quis decipiet michi Achab?" Malus erat spiritus, ille, qui respondit, "Ego ero spiritus mendax in ore omnium prophetarum ejus." Non enim decuit spiritum bonum exequi talia, licet a Domino prodiit judicium, quod Achab mendacio deciperetur. Sed dicet judex forsan, Ego nihil egi manibus meis in cruciatibus istis. Tamen eum presentem esse et quod factum est mandato suo iterum atque iterum aggravare non licuit. Solum magister navis est qui eam ducit ad portum, licet ejus mandato alii agitent proram. Credo quod vulnus quo sauciatur animus judicis penas hujusmodi infli-

gentis nunquam in cicatricem veniet, maxime dum recolit acerbitatem penarum miseri sic afflicti.

Cap. XXIII.—*Hic ostendit quomodo Lex Civilis sepe deficit in Justicia.*

Preterea, si ex contractibus, illatisve injuriis, vel here ditatis titulo, jus accreverit homini agendi in judicio, si testes non fuerint, vel si qui fuerint moriantur, succumbet ipse agens in causa sua, nisi jus suum probare poscit sufficientibus conjecturis quod facere crebro non contingit. Quare de dominiis et aliis possessionibus jure civili regulatis, similiter et in omnibus accionibus cadentibus sub eodem jure, acciones agencium pro defectu testium quam pluries suffocantur, ita quod earum vix pars media optatum finem sortiatur. Qualis tunc est lex hujusmodi, que injuratis taliter deficit in justitia reddenda? Dubito an justa vocari mereatur, quia in eadem lege scribitur, quod "Justitia unicuique tribuit quod suum est," quod non facit lex talis.

Cap. XXIV.—*Hic docet qualiter Comitatus distinguuntur, et Vicecomites eleguntur.*

Exposita jam forma, qua leges Civiles de veritate facti in judicio deducti judicem erudiunt, superest ut modum quo leges Anglie hujusmodi facti eliciunt veritatem, eciam doceamus. Nam ambarum legum formulis contigue possitis, qualitates earundem lucidius eminebunt. Cum dicat Philosophus, quod "opposita juxta se posita magis apparent." Sed in hoc, oratorum more (prohemii loco) quedam prenarrare congruet, quorum agnicione, deinde tractanda clarius patere queant; quare sic procedimus. Regnum

Anglie per Comitatus, ut regnum Francie per Ballivatus distinguitur, ita ut non sit locus in Anglia, qui non sit infra corpus alicujus Comitatus. Comitatus quoque dividuntur in Hundreda, que alicubi Wapentagia nuncupantur. Hundreda vero dividuntur per Villas, sub quarum appellacione continentur et Burgi atque Civitates. Villarum etenim mete non muris, edificiis, aut stratis terminantur, sed agrorum ambitubus, territoriis magnis, hamiletis quibusdam, et multis aliis, sicut aquarum, boscorum, et vastorum, terminis, que jam non expedit nominibus designare; quia vix in Anglia est locus aliquis, qui non infra villarum ambitus contineatur, licet privilegiati loci quidam infra villas de eisdem villis pars esse non concentur. Preterea in quolibet comitatu est officiarius quidam unus, Regis Vicecomes appellatus, qui inter cetera sui officii ministeria omnium mandata et judicia curiarum regis in comititu suo exequenda exequitur, cujus officium annale est, quo ei post annum in eodem ministrare non licet, nec duobus tunc sequentibus annis ad idem officium reassumetur. Officiarius iste sic eligitur. Quolibet anno in crastino Animarum, conveniunt in scaccario regis omnes consiliarii ejus tam domini spirituales et temporales, quam alii omnes justiciarii, omnes barones de scaccario, clericus rotulorum, et quidam alii officiarii, ubi ii omnes communi assensu nominant de quolibet comitatu tres milites vel armigeros, quos inter ceteros ejusdem comitatus ipsi opinantur melioris esse depositionis et fame, et ad officium vicecomitis comitatus illius melius dispositos; ex quibus Rex unum tantum eligit, quem per literas suas patentes constituit vicecomitem comitatus de quo eligitur pro anno tunc sequente. Sed ipse, antequam literas illas recipiat, jurabit super Dei Evangelia, inter articulos alios,

quod bene, fideliter, et indifferenter exercebit et faciet officium suum toto anno illo, neque aliquid recipiet colore aut causa officii sui, ab aliquo alio quam a rege. His jam sic presuppositis, ad eorum, que querimus, indaginem procedamus.

Cap. XXV.—*Qualiter Juratoris elegi debent et jurari.*

Quotiescunque contendentes in curiis Regis Anglie ad exitum placiti super materia facti devenerint, concito justiciarii per breve regis scribunt vicecomiti comitatus, in quo factum illud fieri supponitur, quod ipse venire faciat coram eisdem justiciariis ad certum diem per eos limitatum, duodecim probos et legales homines, de vicineto, ubi illud factum supponitur, qui neutram partium sic placitantium ulla affinitate attingunt, ad recognoscendum super eorum sacramenta, si factum illud factum fuerit, sicut una earundem partium dicit; vel non, sicut altera pars negat. Quo adveniente die, vicecomes returnabit breve predictum coram eisdem justiciariis, una cum panello nominum eorum, quos ipse ad hoc summonuit, quos, si venerint, utraque pars recusare poterit dicendo, quod vicecomes panellum illud favorabiliter fecit pro parte altera, viz. de personis minus indifferentibus. Que exceptio, comperta fuerit vera per sacramentum duorum hominum de eodem panello ad hoc per justiciarios electorum, mox panellum illud quassabitur; et justiciarii tunc scribent Coronatoribus ejusdem comitatus quod ipsi novum faciant panellum. Quod cum fecerint, si et illud consimiliter repertum fuerit vitiatum, eciam et illud quassabitur. Et tunc justiciarii eligent duos de clericis curie illius, vel alios de eodem comitatu, qui in presentia curie per eorum sacramenta facient indifferens panellum, quod deinde per nullam partium illarum calump-

niabitur ; sed cum venerint sic impanellati in curia, quelibet partium excipere potest contra personam cujuscunque eorum, sicut et potest in omni casu et omni tempore, quo aliquis qualitercunque impanellatus comparuerit in curia super veritate exitus hujusmodi juraturus, dicendo, quod impanellatus ille est consanguineus vel affinis parti alteri, vel amicicia quacunque tali sibi conjunctus, quod indifferens ipse non est ostendere inter eos veritatem. Qualium excepcionum tot sunt genera et species, quod non licet eas brevi explicare sermone. Quarum si aliqua reperta fuerit vera, non tunc jurabitur ille contra quem excepcio illa proponitur, sed cancellabitur nomen ejus in panello. Sic quoque fiet de omnibus nominibus impanellatorum quousque duodecim eorum jurentur ita indifferentes, quod versus eos neutra parcium habeat aliquam materiam calumpnie. Horum autem duodecim ad minus quatuor erunt de hundredo, ubi villa in qua factum, de quo contenditur, fieri supponitur, sita est ; et quilibet juratorum predictorum habebit terras vel redditus pro termino vite sue, ad minus ad valenciam annuum duodecim scutorum. Et hic ordo observatur in omnibus accionibus et causis criminalibus realibus et personalibus, preterquam ubi damna vel debitum in personalibus non excedunt quadraginta marcas monete Anglie, quia tunc non requiritur, quod juratores, in accionibus hujusmodi tantum expendere possint. Habebunt tamen terram vel redditum ad valorem competentem juxta discretionem justiciariorum ; alioquin ipsi minime jurabuntur, ne per inediam et paupertatem juratorum hujusmodi, de facili valeant corrumpi aut subornari. Et si per tales excepciones, tot juratorum nomina in panello cancellentur, quod non remaneat numerus sufficiens ad faciendum inde juratam, tunc mandabitur vicecomiti per breve regis, quod ipse apponat plures juratores. Quod et sepius fieri potest, ita quod inquisicio

veritatis super exitu placiti non remanebit ob defectum juratorum. Et hec est forma qualiter juratores et veritatis hujusmodi inquisitores eligi debent in curia regis, similiter et jurari. Quare, quomodo ipsi de veritate illa dicenda onerari debent et informari, jam restat ut queramus.

Cap. XXVI.—*Qualiter Juratores evidenciis et testibus informari debent.*

Juratis demum in forma predicta duodecim probis et legalibus hominibus habentibus ultra mobilia sua possessiones, ut predicitur, sufficientes unde eorum statum ipsi continere poterunt, et nulli parcium suspectis nec invisis, sed eisdem vicinis, legetur in Anglico coram eis per curiam totum recordum et processus placiti quod pendet inter partes, ac dilucide exponetur eis exitus placiti de cujus veritate jurati illi curiam certificabunt. Quibus peractis, utraque parcium per se vel consiliarios suos, in presencia curie, referet et manifestabit eisdem juratis omnes et singulas materias et evidencias quibus eos docere se posse credit veritatem exitus taliter placitati. Et tunc adducere potest utraque pars coram eisdem justiciariis et juratis omnes et singulos testes, quos pro parte sua ipsa producere velit, qui super sancta Dei Evangelia, per justiciarios onerati, testificabuntur omnia que cognoscunt probantia veritatem facti de quo partes contendunt. Et si necessitas exegerit, dividantur testes hujusmodi donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum. Quibus consummatis, postquam juratores illi deinde ad eorum libitum, super veritate exitus hujusmodi, deliberacione quantam ipsi optabunt colloquium habuerint in custodia Ministrorum curie, in loco eis ad hoc assignato, ne iterim eos aliqui subornare valeant, revenient

illi in curiam, et certificabunt justiciarios super veritate exitus sic juncti in presencia parcium (si interesse velint) et maxime petentis. Quorum juratorum dictum per leges Anglie veredictum nuncupatur, et tunc secundum hujusmodi veredicti qualitatem, justiciarii reddent et formabunt judicium suum. Tamen, si pars altera, contra quam veredictum hujusmodi prolatum est, conqueratur se per illud injuste esse gravatam, prosequi tunc potest pars illa versus juratores illos, et versus partem que obtinuit, Breve de Attincta; virtute cujus, si compertum fuerit per Sacramentum vigenti quatuor hominum, in forma prenotata, retornatorum, electorum, et juratorum, qui multo majora habebunt patrimonia quam juratores primi, quod iidem primi juratores falsum fecerunt sacramentum, corpora eorundem primorum juratorum prisone domini regis committentur, bona eorum confiscabuntur, ac omnes possessiones eorundem in manus regis capientur; domus quoque eorum et edificia prosternentur, bosci succidentur, et prata arabuntur; ipsi eciam juratores primi ex tunc infames erunt, nec alicubi recipientur in testimonium veritatis; et pars, que succubuit in priori placito restituetur ad omnia que ipsa perdidit occasione ejus. Quis tunc, etsi immemor salutis anime sue fuerit, non formidine tante pene, et verecundia tante infame veritatem non diceret sic juratus? Et si unus forsan tantus sui honoris prodigus esse non pepercerit, aliqui tamen juratorum tantorum famam suam non negligent, neque bona et possessiones suas taliter distrahi pacientur, propria culpa sua. Nonne jam hic ordo revelandi veritatem, pocior et efficacior est, quam est processus, qualem pariunt Civiles leges? Non hic pereunt cause aut jus alicujus, per mortem aut ob defectum testium; non hic producuntur testes ignoti, conducticii, pauperes, vagi, inconstantes, aut quorum condi-

ciones vel malicie ignorantur. Vicini sunt testes isti, de propriis vivere potentes, fame integre, et opinionis illese, non per partem in curiam ducti, sed per officiarium nobilem et indifferentem electi, et coram judice venire compulsi. Isti omnia sciunt, que testes deponere norunt, et isti testium productorum agnoscunt constancias, inconstanciasque et famam. Quid ultra! vere nichil est, quod veritatem dubii, de quo contendi poterit, detegere valebit, quod juratoribus talibus latere quomodo libet potest aut ignorari, dummodo possibile sit illud venire posse in agnicionem humanam.

Cap. XXVII.—*Hic ostendit qualiter criminalia terminantur in Anglia.*

Sed quomodo in criminalibus leges Anglie scrutantur veritatem eciam rimari pernecessarium est, ut et in eis plenarie agnita ambarum legum forma, que earum efficacius latentem revelat veritatem cercius agnoscamus. Si reus quispiam de felonia aut prodicione in Anglia rettatus, crimen suum coram judicibus dedicat, mox vicecomes comitatus, ubi facinus illud commissum est, venire faciet coram eisdem judicibus viginti quatuor probos et legales homines de vicineto ville, ubi illud factum est, qui rettato illo nulla affinitate attingunt, et quorum quilibet centum solidatus habeat terre et reditus, ad certificandum judices illos super criminis illius veritate. Quibus comparentibus, rettatus ille eos calumpniare potest eadem forma qua in accionibus realibus fieri debere superius describitur. Et insuper reus ipse in favorem vite sue calumpniare potest triginta quinque homines quos ipse maxime formidat, qui ad ejus calumpniam cancellabuntur in panello, aut signis talibus notabuntur, quod (ut verbis legis utar) illi super eum non transibunt, licet ipse nullam causam assignare

sciat excepcionis seu calumpnie sue. Quis tunc mori posset in Anglia inique pro crimine, cum tot juvamina habere ille poterit ob favorem vite sue, et non nisi vicini ejus probi et fideles homines, versus quos ipse nullam habet materiam exceptionis, eum condemnare poterunt? Mallem revera viginti facinorosos mortem pietate evadere, quam justum unum injuste condempnari. Nec tamen reum quempiam sub hac forma, reatus sui penam evadere posse suspicandum est, dum ejus vita et mores timori deinceps erunt eis, qui eum sic purgarunt a crimine. In hoc equidem processu nichil est crudele, nichil inhumanum, nec ledi poterit innocens in corpore aut membris suis. Quare nec formidabit ille calumpniam inimicorum ejus, quia non torquebitur iste ad arbitrium ipsorum. Sub hac igitur lege vivere quietum et securum est. Judica ergo, Princeps optime, que legum harum tibi electissima foret si tu privatam spirares vitam.

CAP. XXVIII.—*Princeps concedit leges Anglie eligibiliores esse subditis quam leges Civiles in casu jam disputato.*

CUI Princeps: Arduum ambiguumve, Cancellarie, non conspicio, quod morosum me titubantemve redderet in eleccione rei quam interrogas. Nam quis non sub lege qua securam ducere posset vitam, vivire pocius eligeret, quam sub lege tali, sub dua inermem, indefensumque ipse se semper redderet sevicie omnium inimicorum ejus? Vere tutus quisquam esse non poterit in corpore aut in bonis, quem inimicus ejus in omni causa convincere poterit testibus duobus eciam ignotis, per ipsummet electis et productis. Et licet quis mortem, per dicta eorum, subire non cogatur in Francia, parum tamen relevatur ipse qui mortem

evasit, contraccione nervorum et membrorum suorum, atque corporis ejus languore perpetuo. Tali revera discrimini impellere potest inimici astucia omnem hominem qui sub lege degit quam tu jamdudum explicasti. Sed tale malum operari nequeunt testes, qui deposiciones suas faciunt in presencia duodecim fide dignorum virorum facto vicinorum de quo agitur, et circumstanciis ejus, qui et noscunt eorundem testium mores, maxime si vicini ipsi fuerint noscunt eciam et si ipsi sint credulitate digni. Omnes eciam duodecim tales latere omnino non poterit, quicquid actum est, per aut inter vicinos eorum. Nosco namque ego cercius, que jam aguntur hic in Barro, ubi sum modo conversatus, quam que in Anglia fiunt. Nec effugere posse puto noticiam probi viri ea, que aguntur, licet quodammodo occulte, prope domicilium ejus. Sed tamen cur predicta lex Anglie, que tam frugi et optabilis est, non est toti mundo communis vehementer admiror.

CAP. XXIX.—*Quare inquisiciones non fiunt per juratas duodecim hominum in aliis regnis sicut in Anglia.*

CANCELLARIUS. Juvenis recessisti, Princeps, ab Anglia, quo tibi ignota est disposicio et qualitas terre illius, quas si agnoveris, et ceterarum regionum emolumenta qualitatesque eisdem comparaveris, non admiraberis ea quibus jam agitur animus tuus. Anglia sane tam fertilis est, quod quantitate ad quantitatem comparata, ipsa ceteras omnes quasi regiones exsuperat ubertate fructuum; eciam suum ultro ipsa profert, vix industria hominis concitata. Nam agri ejus, campi, saltus, et nemora, tanta fecunditate germina ebulliunt, ut inculta illa sepe plus commodi afferant possessoribus suis, quam arata, licet fertilissima ipsa

sint segetum, et bladorum. Includuntur quoque in terra illa pasturarum arva, fossatis et sepibus desuper arboribus plantatis, quibus muniuntur a procellis et estu solis eorum greges et armenta; ipseque pasture ut plurimum irrigue sunt, quo infra earum claustra reclusa animalia custodia non egent per diem, neque per noctem. Nam ibi lupi non sunt, ursi, nec leones; quare de nocte oves eorum incustodite in campis recumbunt, in caulis et ovilibus, quibus impinguantur terre eorum. Unde homines patrie illius vix operis sudore gravantur, quare spiritu ipsi magis vivunt, et fecerunt patres antiqui, qui pascere malebant greges quam animi quietem agriculture sollicitudine turbare. Ex quibus homines regionis istius apti magis redduntur et dispositi ad discernendum in causis, que magni sunt examinis, quam sunt viri qui telluris operibus inhabitantes er ruris familiaritate mentis contrahunt ruditatem. Regio eciam illa ita respersa, refertaque est possessoribus terrarum et agrorum, quod in ea villula tam parva reperiri non poterit, in qua non est miles, armiger, vel pater familias, qualis ibidem Frankelayn vulgariter nuncupatur, magnus ditatus possessionibus; necnon libere tenentes alii, et Valecti plurimi, suis patrimoniis sufficientes ad faciendum juratam in forma prenotata. Sunt namque valecti diversi in regione illa qui plus quam sexcenta scuta per annum expendere possunt; quo jurate superius descripte sepissime in regione illa fiunt, presertim in ingentibus causis, de militibus armigeris et aliis, quorum possessiones in universo excedunt duo millia scutorum per annum. Quari cogitari nequit tales subornari posse, vel perjurari velle, nedum ob timorem Dei, sed et ob honorem suum conservandum, et vituperium et dampnum quoque inde consequutivum, evitandum, eciem ne eorum heredes ipsorum ledantur infamia.

Taliter, Fili Regis, disposita inhabitataque non sunt aliqua alia mundi regna.

Nam licet in eis sint viri magne potentie, magnarum opum et possessionum, non tamen eorum unus prope moratur ad alterum, ut in Anglia tanti morantur viri, nec tanta, ut ibi, hereditorum est copia et possidencium agros.

Vix enim in villata una regionum aliarum reperiri poterit vir unus patrimonio sufficiens, ut in juratis ipse ponatur. Nam raro ibidem, aliqui preter nobiles reperiuntur possessores agrorum aliorumve immobilium, extra civitates et muratas villas. Nobiles quoque ibidem pasturarum copiam non habent, et vineas colere aut aratro manus apponere statui eorum non convenit, tamen in vineis et terris arabilibus consistit substancia possessionum eorum, exceptis solum pratis quibusdam adjacentibus magnis ripariis, et exceptis boscis, quorum pasture communes sunt tenentibus et vicinis suis. Quomodo tunc in regionibus talibus jurata fieri poterit ex duodecim probis hominibus de vicineto, ubi factum aliquod in judicio deducitur, cum vicini dici non poterunt, qui tanta distancia distinguuntur? Vero remotos multum a facto duodecim juratores ibidem esse oportebit, postquam reus in regionibus illis triginta quinque sine assignata causa propinquioribus calumpniaverit. Quare, aut de multum remotis a facto, de quo contenditur, qui veritatem facti non agnoscunt, in regnis illis oportebit facere juratam, aut de pauperibus quibus non est verecundia infamie, nec timor jacture bonorum suorum, cum ipsa non sint; ipsi eciam, rusticitatis ruditate obcecati, veritatis claritatem nequeunt intueri.

Non igitur mireris, Princeps, si lex, qua in Anglia veritas inquiritur, alias non pervagetur naciones, ipse namque, ut Anglia, facere nequeunt sufficientes consimilesque juratas.

Cap. XXX.—*Princeps hic commendat legis Anglie in processu suo per juratus.*

Tunc Princeps. Comparaciones odiosas esse licet dixerimus, lex tamen Civiles, in comparacione per te facta, omni se purgavit a crimine. Quia, licet ei legem Anglie tu pretuleris, odium inde ipsa non meretur, dum neque eam neque conditores ejus increpasti; sed solum patriam ubi ulla regit causam esse demonstrasti quod non tam obtabili processu, ut lex Anglie, ipsa in dubiis elicit veritatem. Legem vero Anglie, in casu jam per te disputato, accommodaciorem esse regno illi quam est lex Civilis ambigere non sinimur; quo eam pro Civili commutare non appetimus. Sed tamen hec legis Anglie preeminencia ab alterius crimine non evenit, solum enim eam Anglie fertilitas sic causavit.

Cap. XXXI.—*Princeps dubitat an processus per juratam repugnet Legi Divine.*

Sed, licet non infime, Cancellarie, nos dilectet forma qua leges Anglie in contencionibus relevant veritatem, tamen, an modus ille sacre repugnet Scripture, vel non, paululum agitamur. Ait namque Dominus Phariseis, Johannis VIII. "In lege vestra scriptum est, quia duorum hominum testimonium verum est;" et huic applaudens Dominus inquit, "Ego sum qui testimonium perhibeo de me ipso, et testimonium perhibet de me, qui misit me, Pater." Pharisei quippe Judei erant, unde idem erat dicere in lege vestra scriptum est, et in lege Moysaica que a Domino per Moysen Filiis Israel prolata fuit scriptum est. Quare huic legi contraire legi est divine refragari, quo sequitur, quod

lex Anglie, si ab hac lege discedat, a lege divina, cui reluctari non licet, ipsa discedit. Scribitur eciam, Matthei xviii. Quod Dominus loquens de correccione fraterna inter alia sic ait, "Si autem non te audierit frater tuus, adhibe tecum adhuc unum aut duos, ut in ore duorum vel trium stet omne verbum." Si in ore duorum vel trium, Dominus omne verbum statuerit, frustra plurium hominum queritur in dubiis veredictum. Nemo enim potest melius aut aliud fundamentum ponere, quam posuit Dominus.

Hec sunt, Cancellarie, que de legis Anglie processu in probacionibus, aliquantulum me conturbant. Quare, quid his respondendum est a te, doceri deposco.

Cap. XXXII.—*Hic ostenditur processum per juratam Legi Divine non repugnare.*

Cancellarius. Non his, quibus turbaris, Princeps, contrariantur leges Anglie, licet aliter quodammodo ipse in dubiis eliciant veritatem. Quid duorum hominum testimonio obest lex illa Generalis Concilii, qua cavetur, ut non nisi duodecim testium deposicione Cardinales de criminibus convincantur? Si verum est duorum testimonium, a fortiori testimonium duodecim verum judicari debet, dicente juris regula, "Plus semper in se continet quod est minus." Supererogacionis meritum promittebatur stabulario, si plus quam duos quos recepit denarios, ipse in vulnerati curacionem erogasset. Nonne plus quam duos aut tres testes producere oportebit quempiam, qui absentem se fuisse probare nititur, tempore criminis sibi impositi, quod per duos aut tres testes adversarius ejus probavit, vel probare paratus est? Sic et qui testes de perjurio convincere satagit, multo illis plures producere necesse est, quo non semper duorum vel trium hominum testimonium

verum esse judicabitur; sed intelligenda est lex illa, quod minore testium numero quam duorum veritas in dubiis non debet exquiri, ut patet per Bernardum Extra. de Testibus cap. *Licet* in Glossa ordinaria, ubi ipse assignat diversos casus, in quibus per leges, plures quam tres oportet producere testes, viz. in aliquibus eorum quinque, et in aliquibus septem. Per duos eciam testes veritatem probari posse, cum non aliter ipsa pateret, utique leges Anglie affirmant. Nam si que supra altum mare extra corpus cujuslibet comitatus regni illius fiant, que postmodum in placito coram Admirallo Anglie deducantur, per testes illa juxta legum Anglie sancciones probari debent. Consimiliter quoque coram Constabulario et Mariscallo Anglie fieri solitum est de facto, quod in regno alio actum est, dummodo ad jurisdiccionem Curie Constabularii cognicio ejus pertineat. Eciam et in Curiis quarundam Libertatum in Anglia, ubi per Legem Mercatoriam proceditur, probant per testes contractus inter mercatores extra regnum factos. Quia in casibus hiis non reperiuntur vicini, per quorum sacramenta jurate ex duodecim hominibus fieri possunt, prout de contractibus et aliis casibus infra regnum Anglie emergentibus, est fieri consuetum. Similiter, si carta, in qua testes nominantur, deducatur in Curia Regis, processus tunc fiet erga testes illos, ipsi quoque recognoscent simul cum duodecim juratoribus per eorum sacramenta utrum charta illa sit factum ejus, cujus supponitur, an non. Quare, legem, qua testibus veritas extorquetur, lex Anglie non condemnat, maxime cum necessitas id deposcat: quia et sic faciunt ipse leges Anglie nedum in casibus jam notatis, sed eciam in quibusdam casibus aliis, quos non expedit hic notare. Sed per testes solum lex ipsa nunquam litem dirimit, que per juratam duodecim hominum decidi poterit, cum sit modus iste

ad veritatem eliciendam multo pocior et efficacior, quam est forma aliquarum aliarum legum orbis, et remocior a corrupcionis et subornacionis periculo. Nec potest hec procedendi forma in causa aliqua ob defectum testium deperire, neque testium, si qui fuerint, attestiones effectum debitum non sortiri, nec perjurari possunt duodecim homines hujusmodi, quin pro eorum crimine ipsi acerbissime puniantur, et nichilominus pars, per eorum deposicionem gravata, remedium debitum consequetur. Ac, non fient hec per extraneorum aut ignotorum hominum arbitrium aut dictamen, sed per proborum nobilium, et fide dignorum, vicinorum partibus, sacramentum, quibus partes ille nullam habent causam calumpnie aut diffidencie de eorum dicto. O quam horrendum et detestabile discrimen sepe accidit ex forma per deposicionem testium procedendi! Nonne, si quis clandestinum contrahat matrimonium, et postea coram testibus mulierem aliam ipse affidaverit, cum eadem consummare matrimonium artabitur in foro contentioso, et postea in penitentiali foro judicabitur ipse concumbere cum prima, si debite requiratur, et penitere debet quotines accione sua propria concubuerit cum secunda, licet in utroque foro judex fuerit homo unus et idem. Nonne in hoc casu, ut in Job scribitur, "Perplexi sunt testiculi Leviathan?" Proh Pudor! vere perplexi sunt; nam cum neutra mulierum harum, neque cum alia contrahens iste extunc concumbet, sine animadversione in foro contendencium et penitencium. Quale malum, inconveniens, aut discrimen per modum et formam processus legis Anglie impossibile est in casu aliquo evenire, eciam si Leviathan ipse ea generare nitatur. Nonne vides jam, Princeps clarissime, leges Anglie tanto magis clarescere, quanto eisdem tu amplius reluctaris?

Cap. XXXIII.—*Quare reges Anglie quidam non delectati sunt in legibus suis.*

Princeps. Video, inquit, et eas inter tocius orbis jura in casu quo tu jam sudasti, prefulgere considero, tamen progenitorum meorum Anglie regum quosdam audivimus, in legibus suis minime delectatos, satagentes proinde leges Civiles ad Anglie regimen inducere, et patrias leges repudiare fuisse conatos: Horum revera consilium vehementer admiror.

Cap. XXXIV.—*Cancellarius hic ostendit causam rei quam Princeps querit.*

Cancellarius. Non admirareris, Princeps, si causam hujus conaminis mente sollicita pertractares. Audisti namque superius quomodo inter leges Civiles precipua sententia est, maxima sive regula, illa que sic canit "Quod Principi placuit, legis habet vigorem;" qualiter non sancciunt leges Anglie, dum nedum regaliter, sed et politice Rex ejusdem dominatur in populum suum, quo ipse in coronacione sua ad legis sue observanciam astringitur sacramento; quod reges quidam Anglie egre ferentes, putantes proinde se non libere dominari in subditos, ut faciunt reges regaliter tantum principantes, qui lege Civili, et potissime predicta legis illius maxima regulant plebem suam, quo ipsi ad eorum libitum jura mutant, nova condunt, penas infligunt et onera imponunt subditis suis, propriis quoque arbitriis, contendencium, cum velint, dirimunt lites; quare, moliti sunt ipsi progenitores tui hoc jugum politicum objicere, ut consimiliter et ipsi in subjectum populum regaliter tantum dominari, sed pocius debacchari queant; non attendentes,

quod equalis est utriusque regis potencia, ut in predicto tractatu de Natura Legis Nature docetur, et quod non jugum, sed libertas est, politice regere populum, securitas quoque maxima nedum plebi, sed et ipsi regi, allevacio eciam non minima solicitudinis sue. Que ut tibi apercius pateant, utriusque regiminis experienciam percunctare, et regimine tantum regali, qualiter rex Francie principatur in subditos suos, exordium sume, deinde, a regalis et politici regiminis effectu, qualiter rex Anglie dominatur in sibi subjectos populos experienciam quere.

Cap. XXXV.—*Mala que evenerunt ex regimine tantum regali.*

Reminiscere, Princeps dive, qualiter villas et oppida regni Francie frugum opulentissima dum ibidem peregrinabaris conspexisti, regis terre illius hominibus ad arma, et eorum equis ita onusta, ut vix in eorum aliquibus quam magnis oppidis tu hospitari velebas: ubi ab incolis didicisti homines illos, licet in villa una per mensem aut duos perhendinaverint, nichil prorsus pro suis aut equorum suorum expensis solvisse, aut solvere velle; sed, quod pejus est, artabant incolas villarum et oppidorum, in que descenderant, sibi de venis, carnibus, et aliis quibus indigebant, eciam carioribus necessariis quam ibi reperiebantur, a circumvicinis villatis, suis propriis sumptibus providere. Et si qui sic facere renuebant, concito fustibus cesi propere hoc agere compellebantur; ac demum consumptis in villa una victualibus, focalibus, et equorum prebendis, ad villam aliam homines illi properabant, eam eciam consimiliter devastando, nec denarium unum pro aliquibus necessariis suis, eciam aut concubinarum suarum, quas in magna copia secum semper vehebant, vel pro sotularibus, caligis, et

aliis hujusmodi, usque ad minimam earum ligulam solverunt, sed singulas suas qualescunque expensas habitatores villarum ubi moras fecerunt, solvere coegerunt. Sicque et factum est in omnibus villis et oppidis non muratis tocius regionis illius, ut non sit ibi villula una expers de calamitate ista, que non semel aut bis in anno, hac nephanda pressura depiletur. Preterea non patitur rex quenquam regni sui sale edere, quod non emat ab ipso rege, precio, ejus solum arbitrio, assesso. Et si insulsum pauper quivis mavult edere quam sal excessivo precio comparare, mox compellitur ille tantum de sale regis ad ejus precium emere, quantum congruet tot personis quot ipse in domo sua fovet. Insuper omnes regni illius incole dant, omni anno, regi suo quartam partem omnium vinorum que sibi accrescunt; et omnis caupo quartum denarium precii vinorum que ipse vendit; et ultra hec, omnes ville et burgi solvunt regi annuatim ingentes summas super eos assessas pro stipendiis hominum ad arma; sic quod armata regis, que quam magna semper est, pascatur annuatim de stipendiis suis, per pauperes villarum, burgorum, et civitatum regni. Et ultra hec, quelibet villa semper sustinet sagittarios duos ad minus, et alique plures in omni apparatu, et habilimentis sufficientibus ad serviendum regi in guerris suis, quociens sibi libet eos summonere, quod et crebro facit; ac hiis non ponderatis, maxima tallagia alia sunt omni anno assessa ad opus regis, super quamlibet villam ejusdem regni, de quibus non uno anno ipsi alleviantur. Hiis et nonnullis aliis calamitatibus plebs illa lacessita in miseria non minima vivit, aquam cotidie bibit, nec alium nisi in solemnibus festis plebeii gustant liquorem. Froccis sive collobitis de canabo ad modum panni saccorum teguntur. Panno de lana, preterquam de vilissima, et hoc

solum in tunicis suis subtus froccas illas, non utuntur, neque caligis nisi ad genua discooperto residuo tibiarum. Mulieres eorum nudipedes sunt exceptis diebus festis, carnes non comedunt mares aut femine ibidem preter lardum baconis, quo impinguant pulmentaria sua in minima quantitate. Carnes assatas coctasve allias ipsi non gustant, preterquam inturdum de intestinis et capitibus animalium pro nobilibus et mercatoribus occisorum. Sed gentes ad arma comedunt alitilia sua, ita ut vix ova eorum ipsis relinquantur pro summis vescenda deliciis. Et si quid in opibus eis aliquando accreverit, quo locuples eorum aliquis reputetur, concito ipse ad regis subsidium plus vicinis suis ceteris oneratur, quo extunc convicinis ceteris ipse equabitur paupertate. Hec, ni fallor, forma est status gentis plebane regionis illius. Nobiles tamen non sic exaccionibus opprimuntur; sed si eorum aliquis calumpniatus fuerit de crimine, licet per inimicos suos, non semper coram judice ordinario ipse convocari solet; sed quam sepe in Regis Cameri, et alibi in privato loco, quandoque vero solum per internuncios, ipse inde alloqui visus est, et mox ut criminosum eum Principis consciencia, relatu aliorum judicaverit, in sacco positus, absque figura judicii, per prepositi mariscallorum ministros noctanter in flumine projectus submergitur; qualiter et mori audivisti majorem multo numerum hominum, quam qui legitimo processu juris convicti extiterunt. Sed tamen, quod Principi placuit (juxta Leges Civiles) legis habet vigorem. Eciam et alia enormia hiis similia, ac quedam hiis deteriora, dum in Francia, et prope regnum illud conversatus es, audisti, non alio quam legis illius colere, detestabiliter, dampnabiliterque perpetrata, que hic inserere nostrum nimium dialogum protelaret. Quare, quid effectus legis politice et regalis, quam quidam progenitorum tuorum pro

lege hac Civili commutare nisi sunt, operatus est in regno Anglie a modo visitemus, ut utraque legum experiencia doctus, que earum tibi eligibilior sit ex earum effectibus elicere valeas, cum (ut supra memoratur) dicat Philosophus, quod, "Opposita, juxta se posita, magis apparent."

Cap. XXXVI.—*Bona que eveniunt ex regimine et regali in Regno Anglie.*

In Regno Anglie, nullus perhendinat in alterius domo invito domino, si non in hospiciis publicis, ubi tunc pro omnibus que ibidem expendit ipse plenarie solvet ante ejus abinde recessum. Nec impune quisque bona alterius capit sine voluntate proprietarii eorundem; neque in regno illo prepeditur aliquis sibi de sale, aut quibuscunque mercimoniis aliis ad proprium arbitrium, et de quocunque venditore, providere. Rex tamen necessaria domus sue, per rationabile precium juxta constabulariorum villarum discreciones assidendum, invitis possessoribus, per officiarios suos capere potest: sed nichilominus precium illud in manibus, vel ad diem per majores officiarios domus sue limitandum, solvere per leges suas obnoxius est: quia nullius subditorum suorum bona juxta leges illas ipse deripere potest sine satisfactione debita pro eisdem. Neque rex ibidem, per se, aut ministros suos, tallagia, subsidia aut quevis onera alia, imponit legiis suis, aut leges eorum mutat, vel novas condit, sine concessione, vel assensu tocius regni sui in Parliamento suo expresso. Quare incola omnis regni illius, fructubus quos sibi parit terra sua, et quos gignit pecus ejus, emolumentis quoque omnibus que industria propria vel aliena, ipse terra marique lucratur, ad libitum proprium utitur, nullius prepeditus injuria vel rapina, quin ad minus inde debitas consequitur emendas; unde inhabitantes terram illam locu-

pletes sunt, habundantes auro et argento, et cunctis necessariis vite. Aquam ipsi non bibunt, nisi qui ob devotionis et penitentie zelum aliquando ab aliis potubus se abstinent, omni genere carnium et piscium ipsi in copia vescuntur, quibus patria illa non modice est referta, pannis de lanis bonis ipsi induuntur in omnibus operimentis suis, eciam abundant in lectisterniis, et quolibet suppellectili cui lana congruit in omnibus domibus suis, necnon opulenti ipsi sunt in omnibus hustilimentis domus, necessariis culture, et omnibus que ad quietam et felicem vitam exiguntur, secundum status suos. Nec in placitum ipsi ducuntur, nisi coram judicibus ordinariis, ubi illi per legis terre juste tractantur. Nec allocuti sive implacitati sunt de mobilibus aut possessionibus suis, vel arrettati de crimine aliquo qualitercunque magno et enormi, nisi secundum leges terre illius, et coram judicibus antedictis. Et hii sunt fructus, quos parit regimen politicum et regale, ex quibus tibi jam apparent experiencie effectus legis, quam quidam progenitorum tuorum objicere conati sunt.

Superius tibi quoque apparent effectus legis alterius, quam tanto zelo loco legis istius ipsi nisi sunt inducere, ut ex fructibus earum tu agnoscas eas. Et nonne ambicio, luxus, et libido, quos predicti progenitores tui regni bono preferebant, eos ad hoc commercium concitabant? Considera igitur, Princeps optime, eciam alia que sequentur.

Cap. XXXVII.—*Combinacio meritorum utriusque regiminis.*

Sanctus Thomas in Libro, quem Regi Cipri de Regemine Principum scripsit dicit quod "rex datur propter regnum, et non regnum propter regem." Quo, omnis potestas regia referri debet ad bonum regni sui, quod effective consistit in

defencione ejusdem ab exterorum incursibus, et in tuicione regnicolarum, et bonornm suorum ab indigenarum injuriis et rapinis. Quare rex, qui hec peragere nequit, impotens est necessario judicandus. Sed si ipse passionibus propriis, aut penuria ita oppressus est, quod manus suas cohibere nequit a depilacione subditorum suorum, quo ipsemet eos depauperat, nec vivere sinit et sustentari propriis substanciis suis, quanto tunc impotencior ille judicandus est, quam si eos defendere ipse non sufficeret erga aliorum injurias? Revera, rex talis nedum impotens, sed et ipsa impotencia, dicendus est, et non liber judicari potest, tantis impotentie nexubus vinculatus. E regione, rex liber et potens est, qui incolas suos erga exteros et indigenas, eorum quoque bona et facultates, nedum erga vicinorum et concivium rapinas defendere sufficit, sed erga propriam oppressionem et rapinam, licet sibi passiones, necessitatesque hujusmodi reluctentur. Quis enim potencior, liberiorve esse potest, quam qui non solum alios, sed et seipsum sufficit debellare? Quod potest, et semper facit rex politice regens populum suum. Quare experientie effectu tibi constat, Princeps, progenitores tuos, qui sic politicum regimen abjicere satagerunt, non solum in hoc non potuisse nancisci potenciam quam optabant, videlicet ampliorem quam habitant; sed et sui bonum, similiter et bonum regni sui, per hoc ipsi discrimini exposuissent, et periculo grandiori. Tamen hec, que jam de experiencie effectu practicata potenciam regis regaliter tantum presidentis exprobrare videntur, non ex legis sue defectu processerunt, sed ex incuria, negligenciaque taliter principantis. Quare, ipsa dignitatem illam potencia non minuunt a dignitate regis politice regulantis, quos paris esse potencie, in predicto Tractatu de Natura Legis Nature, luculenter ostendi. Sed potenciam regis

regaliter tantum principantis difficilioris esse exercici, ac minoris securitatis sibi et populo suo, illa clarissime jam demonstrant, quo obtabile non foret regi prudenti regimen politicum pro tantum regali commutare. Quare et Sanctus Thomas supradictus optare cencetur ut omnia mundi regna politice regerentur.

Cap. XXXVIII.—*Interpellatio Principis.*

Tunc Princeps. Parce, obsecro, Cancellarie, quod te ad tantam a proposito tuo digressionem compuli questionibus meis; michi namque perutilia sunt que hac occasione exarasti, licet te parumper retardaverint a meta intencionis tue, ad quam ut tu jam celerius properes flagito, et primo, ut aliquos alios casus in quibus legum Anglie et Civilium discrepant sententie, ut promisisti et cepisti, mihi enarres.

Cap. XXXIX.—*Secundus casus in quo leges Civiles et leges Anglie discrepant in judiciis suis.*

Cancellarius. Quosdam casus alios, in quibus dissenciunt leges predicte, ut petis, Princeps, detegere conabor. Sed tamen, que legum earum prestancior sit in judiciis suis, non meo, sed arbitratui tuo relinquam.

Prolem ante matrimonium natam, ita ut post, legittimat lex Civilis et succedere facit in hereditate parentum; sed prolem, quam matrimonium non parit succedere non sinit lex Anglorum, naturalem tantum eam esse, et non legittimam proclamans. Civiliste in cusu hoc legem eorum extollunt, quia incitamentum eam esse discunt quo matrimonii sacramento cesset peccatum per quod alias duorum anime interirent. Presumendum quoque esse discunt tales fuisse contrahencium animos in primo eorum concubitu, quales esse demonstrat subsequens sacramentum. Ecclesia eciam

fetus hujusmodi habet pro legittimis. Hec, ni fallor, tria fulcimenta sunt majora quibus ipsi approbant, defenduntque legem suam. Ad que sic respondent legis Anglie periti. Primo dicunt, quod peccatum primi concubitus in casu proposito non purgatur per subsequens matrimonium, licet ejus merito delinquencium quodam modo minuatur pena. Dicunt eciam, quod peccati illius conscii tanto minus inde penitent, quo leges transgressoribus illis favere considerant; quali eciam consideracione procliviores ipsi redduntur ad committendum peccatum, per quod nedum Dei, sed et Ecclesie precepta negligunt; unde lex illa nedum delinquencium participat culpam, sed et legis bone nature ipsa declinat; cum lex sit sanctio sancta, jubens honesta, et prohibens contraria; qualia ipsa non prohibet, sed pocius ad inhonesta animos labencium invitat. Nec vallari potest lex ista per hoc, quod Ecclesia fetus hujusmodi pro legittimis habet. Pia namque mater illa in quam plurimis dispensat, que fieri ipsa non concedit; dispensativa enim laxavit Apostolus virginitatis frena, quod consulere noluit, cum omnes ipse voluerit ut se, virgines permansisse. Et absit, ut mater tanta a filiis in casu isto pietatem suam cohiberet, dum sepe, ipsi eciam hujus legis Civilis fomento concitati, incidunt in peccatum. Et per matrimonium subsequens docetur Ecclesia, contrahentes penitere de preterito, et de futuro per matrimonium se velle cohibere. Sed longe alium in hoc casu lex Anglie effectum operatur, dum ipsa non concitat ad peccatum, neque peccantes fovet, sed terret eos, et ne peccent minatur penas. Carnis etenim illicebre fomento non egent, egent vero frenis, quia irritamenta carnis lasciva et quasi infatigabilia sunt. Et homo, quum in individuo perpetuari nequit, perpetuari naturaliter appetit in specie sua, quia omne quod vivit assimilari cupit cause prime,

que perpetua est et eterna. Unde sit, quod plus delectatur homo in sensu tactus, quo servatur species ejus, quam in sensu gustus, quo conservatur individuum. Quare Noe ulciscens in filium qui ejus pudenda revelavit, nepoti suo filio delinquentis maledixit, ut inde plus cruciaretur reus, quam proprio possit incommodo. Quare lex que vindicat in progeniem delinquentis penalius prohibet peccatum, quam que solum delinquentem flagellat. Ex quibus considerare licet, quanto zelo lex Anglie illicitos prosequitur concubitus, dum ex eis editam prolem ipsa nedum judicat non esse legittimam, sed et succedere prohibet in patrimonio parentum. Num quid tunc, lex ista casta non est? et non forcius, firmiusque repellit peccatum, quam facit lex predicta Civilis, que cito, et quasi inultum crimen luxurie remittit?

Cap. XL.—*Cause speciales quare Nothi non legettimantur per matrimonium subsequens in regno Anglie.*

Preterea, Leges Civiles dicunt, filium naturalem tuum esse filium populi. De quo Metricus quidam sic ait,

> Cui pater est populus, pater est sibi nullus et omnis:
> Cui pater est populus, non habet ille patrem.

Et si patrem non habuit tempore nativitatis sue, quomodo ex post facto ipse patrem nancisci poterit, natura non novit. Quo, si ex fornicatoribus duobus mulier una filios peperit duos, quam postea unus ex concubinariis illis ducat in uxorem, quis ex filiis hiis duobus per matrimonium illud legittimatur? Opinio suadere potest, sed racio reperire nequit, dum ambo filii illi populi fetus judicati semel parentes ignorabant. Inconsonum propterea videretur, quod in matrimonio illo extunc ab eadem muliere natus, cujus generacio

ignorari non poterit, expers esset hereditatis, et filius nescius genitoris sui succederet patri et matri ejus, maxime infra regnum Anglie, ubi filius senior solus succedit in hereditate paterna. Et non minus incongruum esse sentiret arbiter equus, si filius ex stupro equaliter participaret cum filio ex legittimo thoro hereditatem, que Jure Civili inter masculos dividenda est. Nam Sanctus Augustinus, XVI. Libro de Civitate Dei, sic scribit, "Abraham omnem censum suum dedit Isaac filio suo, filiis autem concubinarum dedit daciones." Ex quo videtur innui, quod spuriis non debetur hereditas, sed victus necessitas. Hec ille. Sub nomine vero spurii denotat Augustinus, omnem fetum illegittimum, qualiter et sepius facit Scriptura sacra, que neminem vocat bastardum. Ecce differenciam non minimam sentit Augustinus, sentit et Abraham inter successionem spurii et filii ex legittimo concubitu. Ceterum, omnes filios illegittimos reprehendit Scriptura sacra sub metaphora hac, dicens, "Spuria vitulamina non dabunt radices altas, nec stabile fundamentum collocabunt." (Sapientie IV.) Reprehendit et Ecclesia, que eos a sacris repellit ordinibus, et si cum tali dispensaverit, non eum tamen permittit dignitate preesse in Ecclesia Dei. Congruit idcirco legi hominum, in successionis beneficio minuere, quos ecclesia indignos judicat sacro ordine, et quos ipsa repellit ab omni prelacia: ipsos eciam, quos Scriptura sacra in natalibus minoratos judicat a legittime procreatis. Gedeon autem, virorum fortissimus, septuaginta filios in matrimonio legitur procreasse, et non nisi unum solum habuisse ex concubina; filius tamen ipse concubine omnes filios illos legittimos nequiter peremit, excepto uno solo. (Judicum IX.) Quo, in notho uno plus malitie fuisse deprehenditur quam in filiis legittimis sexaginta novem. Tritum etenim proverbium

est, "Si bonus est bastardus, hoc ei venit a casu, videlicet gratia speciali, si autem malus ipse fuerit, hoc sibi accidit a natura." Corrupcionem namque et maculam quandam censetur illegittimus partus contrahere a peccato genitorum suorum sine culpa ejus, ut maximam nos contraximus omnes a crimine primorum parentum, licet non tantam. Aliam tamen nothi quam legittimi contrahunt maculam ex genitura sua; eorum namque generacionen mutua utriusque parentis libido culpabilis operatur, qualiter in legittimis castisque amplexibus conjugatorum ipsa non solet debacchari. Mutuum sane et commune est peccatum taliter fornicantium; quo, primo similatum peccato magis sevit in fetum, quam peccatum aliter, solitarieque peccancium; ut exinde natus pocius peccati filius dici mereatur, quam filius peccatorum. Quare Sapientie Liber generaciones has duas distinguens de generacione legittima sic affatur, "O quam pulchra est casta generacio cum claritate! Immortalis est enim memoria illius, quoniam apud Deum nota est apud homines." Altera vero non est nota apud homines, quo filii ex ea nati, filii populi nominantur. De generacione utique illa altera, liber ille dicit, "Ex iniquis omnes filii qui nascuntur testes sunt nequicie adversus parentes suos, in interrogacione sua." (Sapientie eodem IV. cap.) Interrogati etenim de parentibus suis, eorum ipsi revelant peccatum, ut filius Noe nequam revelavit pudenda patris sui. Creditur idcirco, cecum illum natum, de quo Pharisei, (Johannis IX.) dixerunt, "Tu in peccatis natus es totus," fuisse bastardum, qui nascitur totaliter ex peccato; et dum subditur, "Et tu doces nos?" videtur eos intellexisse, bastardum non ut legittimum in naturalibus esse dispositum ad scienciam et doctrinam. Non igitur bene dividit lex illa, que bastardos a nativitate,

et legittimos parificat in hereditate paterna, cum eos dispares judicet Ecclesia in hereditate Dei, similiter et distinguat sacra Scriptura in forma prenotata, dividatque natura in donis suis, signans naturales tantum nevo quasi naturali quodam, licet latente in animis suis. Quam igitur legum istarum, Anglicarum, viz. et Civilium, in casu hoc, tu Princeps, amplecteris et judicas preferendam?

Cap. XLI.—*Princeps approbat legem que non legittimat natos ante matrimonium.*

Princeps. Revera eam, que forcius a regno peccatum eliminat, et firmius in eo virtutem conservat. Arbitror eciam illos in legis humane beneficiis minorandos, quos lex divina indigniores considerat, et quos postponit Ecclesia in beneficiis suis, natura quoque procliviores judicat ad peccandum.

Cap. XLII.—*Tercius casas in quo discrepant leges predicte.*

Cancellarius. Recte estimo te sentire, quare et casus alios memorabor, in quibus discrepant he leges due. Leges Civiles sanciunt, quod "Partus semper sequitur ventrem." Ut, si mulier servilis condicionis nubat viro condicionis libere, proles eorum servus erit: et e converso, servus maritatus libere, non nisi liberos gignit. Sed lex Anglie nunquam matris, sed semper patris condicionem imitari partum judicat; ut ex libera, eciam ex nativa, non nisi liberum liber generet, et non nisi servum in matrimonio procreare potest servus. Que, putas, legum harum melior est in sentenciis suis? Crudelis est lex, que liberi prolem sine culpa subdit servituti. Nec minus crudelis censetur, que libere sobolem sine merito redigit in servitutem. Legiste vero

dicunt, Leges Civiles prevalere in his Judiciis suis. Nam dicunt, quod "non potest arbor mala fructus bonos facere, neque arbor bona fructus malos facere;" ac omnis legis sentencia est, quod plantacio quelibet cedit solo quo inseritur; cercior quoque multo est partus que eum fuderunt viscera, quam quis eum pater procreavit. Ad hec legis Anglie consulti dicunt, quod "partus ex legittimo thoro non cercius noscit matrem quam genitorem suum;" nam ambe leges, que jam contendunt, uniformiter dicunt, quod "ipse est pater, quem nupcie demonstrant." Numquid tunc magis est conveniens, ut filii condicio ad patris pocius quam ad matris condicionem referatur, cum de conjugatis dixerat Adam, "Erunt ipsi duo in carne una;" quod Dominus exponens in Evangelio ait, "Jam non sunt duo, sed una caro." Et cum masculinum concipiat femininum ad masculinum quod dignius est referri debet tota caro sic facta una. Quare Adam et Evam vocavit Dominus, non Evam, sed quia caro una ipsi erant, ambos eos vocavit ipse nomine viri, videlicet, Adam, ut patet Genesis quinto capitulo. Ipse quoque Leges Civiles dicunt, quod mulieres semper coruscant Radiis maritorum suorum. Unde (C. De Incolis Libro X. Ti. fi.) textus sic loquitur "Mulieres honore maritorum erigimus, et genere nobilitamus, et forum ex eorum persona statuimus, et domicilium mutamus. Sin autem minoris ordinis virum postea sortite, priore dignitate private, posterioris mariti consequantur condicionem et domicilium." Et cum nomen patris, et non matris, gerat proles omnis, et maxime masculina, unde tunc provenire poterit quod filius racione matris amitteret honorem, condicionemve patris sui mutaret, cujus tamen nomen ipse retinebit, presertim dum honore patris ejusdem ac condicione resplendeat mater ejus, et dum viri honor vel condicio nunquam per uxoris

vitium denigratur. Crudelis nempe censeretur lex, que sine causa filium liberi servituti committit et terram pro qua liber ille innocens a crimine sudavit innocentis filii sui titulo non sudanti tradet extraneo possidendam, ac patris nomen eciam filii servitutis nota commaculat. Crudelis eciam necessario judicabitur lex, que servitutem augmentat, et minuit libertatem; nam pro ea Natura semper implorat humana. Quia, ab homine, et pro vicio, introducta est servitus; sed libertas a Deo hominis est indita nature. Quare ipsa ab homine sublata semper redire desiderat, ut facit omne quod libertate naturali privatur. Quo impsius et crudelis judicandus est, qui libertati non favet. Hec considerancia Anglie jura in omni casu libertati dant favorem. Et licet jura illa judicent eum servum quem servus in conjugio ex libera procreavit, non per hoc jura illa rigida crudeliave sentiri poterunt. Nam mulier que conjugio servo se subjecit, facta ei caro una, quo ipsa, ut dicunt leges suprascripte, ejus consequitur condicionem, et proprio arbitrio se fecit ancillam, sed pocius servam, nullatenus a lege coacta, qualiter et faciunt qui se servos reddunt in curiis regum, vel in servitutem se vendunt, nullatenus ad hoc compulsi. Quo modo tunc liberum sanccire possunt leges filium illum quem mater talis taliter est enixa? Nunquam enim sic subjectus est vir uxori, licet maxima domina ipse fuerit, ut subjecta est libera hec servo, quem ipsa facit dominum ejus, dicente Domino uxori omni, "Eris sub potestate viri, et ipse dominabitur tibi." Et quid est, quod dicunt legiste illi de fructu arboris bone vel male? nonne condicionis libere vel servilis est uxor omnis, qualis est maritus ejus? Et in cujus solo plantavit maritus, dum uxor ejus est sibi caro una? nonne in proprio? Quid si surculum dulcis nature inseverit ipse stipiti arboris acerbe, dummodo arbor illa ejus est, nonne

fructus, licet ex stipite parumper, redolent, semper sint fructus ejus, et natura dulcis ut erat surculus quem dominus arboris inferunt? Sic ex muliere genita proles mariti est progenies, fuerit mater libera vel ancilla. Sanciunt tamen leges Anglie, quod dominus native a libero in matrimonium sumpte ipso inconsulto, cum eam repudiare nequeat, (dicente Evangelio, "Quos Deus conjunxit homo non separet,") recuperabit versus liberum illum omne damnum quod ipse sustinuit racione deperditi servitii, et amisse ancille. Hec jam, ut estimo, est summa et forma legis Anglie, in casu jam enarrato. Quid igitur jam tibi videtur, Princeps, in casu isto? Et que legum predictarum prestantior aut eligibilior a te judicatur?

Cap. XLIII.—*Princeps approbat legem qua partus non sequitur ventrem.*

Princeps. Anglorum legem in hoc casu Romanorum legi prestare, dubitare nos racio non permittit. Et optacior michi semper est lex, que favorem pocius quam rigorem partibus administrat. Recolo namque illius juris regulam que sic dicit, "Odia perstringi, et favores convenit ampliari." Cancellarius, Et bene quidem. Alium adhuc casum tibi referam, Princeps, in quo concertant leges iste, et non multum postea tunc desistam, ne onerosum tibi sit tantis sollicitari schismatibus, eciam ne in fastidium tibi veniat disceptacio mea diucius protelata.

Cap. XLIV.—*Quartus casus in quo leges predicte variant.*

Leges Civiles impuberum tutelas proximis de eorum sanguine committunt, agnati fuerint seu cognati, unicuique videlicet secundum gradum et ordinem, quo in hereditate

pupilli successurus est. Et racio legis hujus est, quia nullus tenerius favorabiliusve infantem alere sataget quam proximus de sanguine ejus. Tamen longe alitur de impuberum custodia statuunt leges Anglie. Nam ibidem, "Si hereditas, que tenetur in socagio, descendat impuberi ab aliquo agnatorum suorum, non erit impubes ille sub custodia alicujus agnatorum ejus, sed per ipsos cognatos, videlicet consanguineos ex parte matris ipse regetur." Et si ex parte cognatorum hereditas sibi descenderit, pupillus ille cum hereditate sũa per proximum agnatum, et non cognatum ejus custodietur, quo usque ipse fuerit adultus. Nam leges ille dicunt, quod "committere tutelam infantis illi qui est ei proxime successurus, est quasi agnum committere lupo ad devorandum." Sed si hereditas illa, non in socagio, sed teneatur per servitium militare, tunc per leges terre illius, infans ipse et hereditas ejus non per agnatos neque per cognatos, sed per dominum feodi illius custodientur, quousque ipse fuerit etatis viginti et unius annorum. Quis, putas, infantem talem, in actibus bellicis, quos facere racione tenure sue ipse astringitur domino feodi sui, melius instruere poterit aut velit quam dominus ille cui ab eo servicium tale debetur, et qui majoris potencie et honoris estimatur, quam sunt alii amici propinqui infantis? Ipse namque, ut sibi ab eodem tenente melius serviatur, dilligentem curam adhibebit, et melius in hiis eum erudire expertus esse censetur, quam reliqui amici juvenis, rudes forsan, et armorum inexperti, maxime si non magnum fuerit patrimonium ejus. Et quod utilius est infanti, qui vitam et omni sua periculis bellicis exponet in servicio domini sui racione tenure sue, quam in milicie actubusque bellicis imbui, dum minor est, cum actus hujusmodi ipse in etate matura declinare non poterit? Et revera non minime erit regno accom-

modam, ut incole ejus in armis sint experti. Nam, ut dicit Philosophus, "Audactor quilibet facit, quod se scire ipse non diffidit." Nunquid tunc legem hanc, tu approbas, Fili Regis, et collaudas super legem alteram jam descriptam?

Cap. XLV.—*Hic commendat Princeps educacionem orphanorum filiorum nobilium.*

Princeps. Immo, Cancellarie, legem hanc plusquam alteram ego laudo. Nam in ejus parte prima, quam tu notasti, caute magis, quam Civilis, ipsa providet securitati pupilli. Sed tamen in ejus parte secunda, magis ego delector. Nam ab ea est, quod in Anglia nobilium progenies de facili degenerari non potest, sed probitate pocius, strenuitate, et morum honestate antecessores suos ipsa transcendet, dum in alciori nobiliorique curia quam in domo parentum illa sit imbuta, licet in domo consimili forsan parentes ejus educati erant; quia consimilis adhuc non erat domus parentum illorum domui dominorum, quibus ipsi parentes et ipsi infantes servierunt. Princepes quoque regni sub hac lege regulati, similiter et domini alii a rege immediate tenentes non possunt de levi in lasciviam, ruditatemve labi, cum in puericia dum orphani fuerint ipsi in domo regia nutriuntur. Quare non infime domus regie opulenciam, magnitudinemque collaudo, dum in ea gimnasium supremum sit nobilitatis regni; scola quoque strenuitatis probitatis, et morum quibus regnum honoratur, et floret, ac contra irruentes securatur; eciam formido ipsa erit inimicis et amicis regni. Hoc revera bonum accidisse non potuisset regno illi, si nobilium filii, orphani, et pupilli, per pauperes amicos parentum suorum nutrirentur. Nec regni bono officere potest, licet burgensium filii et aliorum libere tenentium, qui in socagio tenent tenementa sua, quo ipsi ad mili-

ciam non astringuntur, in domo consimilium amicorum suorum educantur, ut perspicue consideranti lucide apparere potest.

Cap. XLVI.—*Adhuc recitat casus alios in quibus variant leges antedicte.*

Tunc Cancellarius. Sunt et alii casus nonnulli, in quibus differunt leges predicte. Ut quia leges Civiles judicant furtum manifestum, per reddicionem quadrupli, et furtum non manifestum, per dupli recompensacionem, expiari. Sed leges Anglie neutrum facinorum illorum micius, quam committentis morte puniri permittunt, dum modo ablati valor duodecim denariorum valorem excedat. Item libertinum ingratum leges Civiles in pristinam redigunt servitutem: sed leges Anglie semel manumissum semper liberum judicant, gratum et ingratum. Alii quoque sunt casus hujuscemodi non pauci, quos jam studio brevitatis pretereo. Et neque in hiis duobus casibus predictarum legum prestancias ego jam describo, cum non magne sint indaginis eorum qualitates. Nec diffido ingenii tui solerciam eas sufficienter posse rimari.

Cap. XLVII.—*Princeps parvi pendit casus jam recitatos.*

Princeps. Nec expedit, Cancellarie, in hiis multum suadare. Quia licet in Anglia, fures clandestini et manifesti passim morte plectantur, non cessant ipsi ibidem omnino predari, ac si penam tantam illi minime formidarent. Quanto tunc minus se abstinerent a crimine, si penam previderent miciorem? Et absit, a servitute semel evasum semper deinde sub minis tremere servitutis, maxime ingratitudinis colore,

cum ingratitudinum species vix poterint pre multitudine numerari, et humana natura in libertatis causa favorem semper, magis quam in causis aliis, deprecetur.

Sed jam, Cancellarie, obnixe te imploro, ut a modo amissa plurium casuum hujusmodi examinacione, michi edicas quare leges Anglie, tam bone, frugi, et optabiles, in Universitatibus non docentur, ut Civiles similiter et Canonum leges; et quare in eisdem non datur Baccalareatus et Doctoratus gradus, ut in aliis Facultatibus et Scienciis est dari consuetum.

Cap. XLVIII.—*Ostendit hic Cancellarius quare leges Anglie non docentur in Universitatibus.*

Cancellarius. In Universitatibus Anglie non docentur Sciencie nisi in Latina lingua; et leges terre illius in triplici lingua addiscuntur, viz. Anglica, Gallica, et Latina. Anglica, quia inter Anglos lex illa maxime inolevit; Gallica, quia postquam Galli, Duce Wilhelmo Anglie Conquestore, terram illam optinuerunt, non permiserunt ipsi eorum advocatos placitare causas suas, nisi in lingua quam ipsi noverunt; qualiter et faciunt omnes advocati in Francia, eciam in Curia Parliamenti ibidem. Consimiliter Gallici post eorum adventum in Angliam, ratiocinia de eorum proventibus non receperunt nisi in proprio idiomate, ne ipsi inde deciperentur. Venari eciam, et jocos alios exercere, ut talorum et pilarum ludos, non nisi in propria lingua delectabantur; quo, et Anglici, ex frequenti eorum in talibus comitiva, habitum talem contraxerunt, quod hucusque ipsi in ludis hujusmodi, et compotis, linguam locuuntur Gallicanam, et placitare in eadem lingua soliti fuerunt, quousque mos ille vigore cujusdam statuti quam plurimum restrictus est; tamen in toto, hucusque aboleri

non potuit; tum, propter terminos quosdam, quos plus proprie placitantes, in Gallico quam in Anglico, exprimunt; tum quia Declaraciones, super Brevia Originalia, tam convenienter ad naturam brevium illorum pronunciari nequeunt, ut in Gallica, sub quali sermone Declaracionum hujusmodi formule addiscuntur. Reportantur eciam, ea que in Curiis Regiis placitantur, disputantur, et judicantur, ac in libros ad futurorum eruditionem rediguntur, in sermone semper Gallico. Quam plurima eciam statuta regni illius in Gallico conscribuntur. Unde accidit, quod lingua jam in Francia vulgaris, non concordat aut consimilis est Gallico inter legis peritos Anglie usitato, sed vulgarie quadam ruditate corrupta. Quod fieri non accidit in sermone Gallico infra Angliam usitato, cum sit sermo ille ibidem sepius scriptus quam locutus. Sub tertia vero linguarum predictarum, viz. sub Latina, omnia Brevia Originalia et Judicilia, similiter et omnia Recorda Placitorum in Curiis Regum, eciam et quedam statuta scribuntur. Quare, dum leges Anglie in his tribus addiscuntur linguis, ipse in Universitatibus, ubi solum Latina exercetur lingua, convenienter erudiri non poterunt, aut studeri. Leges tamen ille, in quodam studio publico, pro illarum apprehensione omni Universitate convenientiore et proniore, docentur et addiscuntur. Studium namque istud situm est prope Curiam Regis, ubi leges ille indies placitantur, disputantur, et Judicia per easdem redduntur per Judices, viros graves, senes, in legibus illis peritos et graduatos; quo in curiis illis, ad quas omni die placitabili confluunt studentes in legibus illis quasi in scolis publicis, leges ille leguntur et docentur. Situatur eciam studium illud inter locum Curiarum illarum et Civitatem London, que de omnibus necessariis opulentissima est omnium civitatum et oppi-

dorum regni illius. Nec in civitate illa, ubi confluencium turba studencium quietem perturbare possit, situm est studium istud; sed seorsim parumper, in civitatis illius suburbio, et propius curiis predictis, ut ad eas sine fatigacionis incommodo studentes indies ad libitum accedere valeant.

Cap. XLIX.—*Hic ostendit disposicionem generalem studii legum Anglie.*

Sed ut tibi constet, Princeps, hujus studii forma et imago, illam ut valeo, jam describam. Sunt namque in eo decem Hospicia minora, et quandoque vero plura, que nominantur Hospicia Cancellarie. Ad quorum quodlibet pertinent centum studentes ad minus, et ad aliqua eorum major in multo numerus, licet non omnes semper in eis simul conveniant. Studentes etenim isti, pro majori eorum parte, juvenes sunt, originalia, et quasi legis elementa addiscentes, qui in illis proficientes ut ipsi maturescunt, ad majora Hospicia studii illius, que Hospicia Curie appellantur, assumuntur. Quorum majorum quatuor sunt in numero, et ad minimum eorum pertinent in forma prenotata ducenti studentes aut prope. In his enim majoribus hospiciis, nequaquam potest studens aliquis sustentari minoribus expensis in anno, quam octoginta scutorum; et si servientem sibi ipse ibidem habuerit, ut eorum habet pluralitas, tanto tunc majores ipse sustinebit expensas. Occasione vero sumptuum hujusmodi, cum ipsi tanti sint non nisi nobilium filii in hospiciis illis leges addiscunt; cum pauperes et vulgares, pro filiorum suorum exhibicione, tantos sumptus nequeant sufferre, et mercatores raro cupiant tantis oneribus annuis attenuare mercandisas suas. Quo fit, ut vix doctus in legibus illis reperiatur in regno qui non sit nobilis, aut de nobilium genere egressus;

unde magis aliis consimilis status hominibus, ipsi nobilitatem curant, et conservacionem honoris et fame sue. In his revera hospiciis majoribus, eciam et minoribus, ultra studium legum, est quasi gimnasium omnium morum qui nobiles decent. Ibi cantare ipsi addiscunt, similiter et se exercent in omni genere harmonie. Ibi eciam tripudiare, ac jocos singulos nobilibus convenientes, qualiter in domo regia exercere solent enutriti. In ferialibus diebus eorum pars major legalis discipline studio, et in festivalibus sacre Scripture et Cronicorum leccioni post Divina obsequia se confert. Ibi quippe disciplina virtutum est, et viciorum omnium relegacio. Ita ut propter virtutis acquisicionem, vicii eciam fugam, milites, barones, alii quoque magnates et nobiles regni, in hospiciis illis ponunt filios suos, quamvis non gliscunt eos legum imbui disciplina, nec ejus exercicio vivere, sed solum ex patrimoniis suis. Ibi vix unquam sedicio, jurgium, aut murmur resonat, et tamen delinquentes non alia pena quam solum a communione societatis sue amocione plectuntur; quia penam hanc ipsi plus formidant, quam criminosi alibi carcerem timent, aut vincula; nam semel ab una societatum illarum expulsus nunquam ab aliqua ceterarum societatum earundem recipitur in socium; quo ibi pax est continua, et quasi amicitia conjunctorum est eorum omnium conversacio. Formam vero, qua leges ille in his discuntur hospiciis, hic exprimere non expedit; cum tibi, Princeps, eam experiri non liceat. Scito tamen, quod delectabilis ipsa est, et omni modo expediens legis illius discipline, omni quoque affeccione digna. Unum tamen te scire desidero, quod neque Aurelianis, ubi tam Canones addiscuntur, quam Civiles leges, et quo a quampluribus regionibus confluunt scolares, neque Andaginis, aut in Cadomo, aliave Universitate Francie, preterquam solum Pari-

siis, reperiuntur tot studentes infanciam evasi, sicut in hoc studio; licet ibi addiscentes omnes solum ab Anglia sint oriundi.

CAP. L.—*De statu et gradu servientis ad Legem, et quomodo ipse creatur.*

SED cum tu, Princeps, scire desideres, cur in legibus Anglie non datur Baccalareatus et Doctoratus Gradus, sicut in utroque jure in universitatibus est dare consuetum; scire te volo, quod licet gradus hujusmodi in legibus Anglie minime conferantur, datur tamen in illis, nedum gradus, sed et status quidam gradu Doctoratus non minus celebris aut solempnis, qui Gradus Servientis ad Legem appellatur. Et confertur sub hac, que subsequitur, forma. Capitalis Justiciarius de Communi Banco, de consilio et assensu omnium justiciariorum eligere solet, quociens sibi videtur opportunum, septem vel octo de maturioribus personis qui in predicto generali studio magis in legibus profecerunt, et qui eisdem justiciariis optime disposicionis esse videntur, et nomina eorum ille deliberare solet Cancellario Anglie in scriptis, qui illico mandabit per brevia regis cuilibet electorum illorum, quod sit coram Rege ad diem per ipsum assignatum, ad suscipiendum Statum et Gradum Servientis ad Legem sub ingenti pena, in quolibet brevium predictorum limita. Ad quem diem quilibet eorum comparens jurabitur super sancta Dei Evangelia fore paratum ad diem et locum tunc sibi statuendos, ad recipiendum statum et gradum predictos, et quod ipse in die illo dabit aurum, secundum consuetudinem regni in hoc casu usitatam. Tamen, qualiter ad diem illam, quilibet electorum illorum predictorum se habebit, nec non formam et modum, qualiter status et gradus hujusmodi conferentur et recipientur, hic inserere omitto, cum

scripturam majorem illa exigant quam congruit operi tam succincto. Tibi tamen, ore tenus, ea alias explicavi. Scire tamen te cupio, quod adveniente die sic statuto electi illi, inter alias solempnitates, festum celebrant, et convivium ad instar coronationis regis, quod et continuabitur per dies septem; nec quisquam electorum illorum sumptus, sibi contingentes circa solempnitatem creacionis sue, minoribus expensis perficiet quam mille et sexcentorum scutorum; quo, expense, quas octo sic electi tunc refundent, excedunt summam duodecim millium et octingentorum scutorum; quarum expensarum pars quedam, inter cetera, hec erit: Quilibet eorum dabit anulos de Auro, ad valenciam in toto quadraginta librarum ad minus monete Anglicane. Et bene recolit Cancellarius ipse, quod cum ille statum et gradum hujusmodi receperat, ips e solvit pro anulis, quos tunc distribuit quinquaginta libras, que sunt trecenta scuta. Solet namque unusquisque Servientum hujusmodi tempore creacionis sue dare cuilibet Principi, Duci, et Archiepiscopo, in solempnitate illa presenti, ac Cancellario, et Thesaurario Anglie, anulum ad valorem octo scutorum. Et cuilibet Comiti et Episcopo consimiliter presentibus, nec non Custodi privati sigilli, utrique Capitali Justiciario, et Capitali Baroni de Saccario Regis anulum ad valorem sex scutorum. Et omni Domino Baroni Parliamenti, et omni Abbati et notabili Prelato, ac magno Militi tunc presenti, Custodi eciam rotulorum Cancellarie Regis, et cuilibet Justiciariorum, anulum ad valenciam quator scutorum. Similiter et omni Baroni de Saccario Regis, Camerariis, eciam omnibus Officiariis et notabilibus viris in Curiis Regis ministrantibus, anulos minoris precii, convenientes tamen statibus eorum quibus donantur. Ita quod, non erit clericus, maxime in Curia Communis Banci, licet infimus, quin anulum ipse re-

cipiet convenientem gradui suo. Et ultra hos ipsi dant anulos aliis amicis suis. Similiter et libratam magnam panni unius secte, quam ipsi tunc distribuent in magna habundancia, nedum familiaribus suis, sed et amicis aliis et notis qui eis attendent et ministrabunt tempore solempnitatis predicte. Quare, licet in Universitatibus in gradum Doctoratus erecti expensas non modicas faciant tempore creacionis sue, ac birreta, alia quoque donaria quam bona erogent, non tamen aurum ipsi conferunt, aut alia donaria sumptusve faciunt his expensi similia. Neque in regno aliquo orbis terrarum datur gradus specialis in legibus regni illius, preterquam solum in regno Anglie. Nec est advocatus in universo mundo, qui racione officii sui tantum lucratur, ut serviens hujusmodi. Nullus eciam, licet in legibus regni illius scientissimus fuerit, assumeter ad officium et dignitatem Justiciarii in Curiis Placitorum coram ipso Rege, et Communis Banci, que sunt supreme curie ejusdem regni ordinarie, nisi ipse primitus statu et gradu servientis ad legem fuerit insignitus. Nec quisquam, et preterquam serviens talis, in curia Communis Banci ubi omnia realia placita placitantur, placitabit. Quare ad statum et gradum talem, nullus hucusque assumptus est, qui non in predicto generali legis studio sexdecem annos ad minus antea complevit. Et in signum quod omnes justiciarii illi taliter extant graduati, quilibet eorum semper utitur, dum in curia Regis sedet, birreto albo de serico, quod primum et precipuum est de insignibus habitus, quo servientes ad legem, in eorum creacione, decorantur. Nec birretum illud justiciarius, sicut nec serviens ad legem unquam deponet, quo caput suum in toto discooperiet, eciam in presentia regis, licet cum celsitudine sua ipse loquatur. Quare, Princeps preclarissime, tu amodo hesitare non poteris quin leges iste, que tam sin-

gulariter supra Civiles leges, leges eciam omnium aliorum regnorum honorantur, et tam solempni statu eruditorum et ministrantium in eis venerantur, pretiose sint, nobiles, et sublimes, ac magne prestantie, maximeque sciencie et virtutis.

Cap. LI.—*De modo creacionis Justiciarii, et de habitu et conversatione ejus.*

Sed ut justiciariorum sicut et serventiem ad legem status tibi innotescat, eorum formam, officiumque ut potero jam describam. Solent namque in Communi Banco quinque justiciarii esse, vel sex ad majus. Et in Banco Regis, quatuor vel quinque. Ac quociens eorum aliquis, per mortem vel aliter cessaverit, rex de advisamento concilii sui eligere solet unum de servientibus ad legem, et eum per litteras suas patentes constituere in justiciarium, loco judicis sic cessantis. Et tunc Cancellarius Anglie adibit curiam, ubi justiciarius sic deest, deferens secum litteras illas, ac sedens in medio justiciariorum, introduci facit servientem sic electum; cui in plena curia ipse notificabit voluntatem regis de officio judiciario sic vacante, et legi faciet in publico litteras predictas: quo facto, Custos rotulorum Cancellarie Regis leget coram eodem electo jusjurandum quod ipse facturus est, quod et cum supra Sancta Dei Evangelia ipse juraverit, Cancellarius sibi tradet litteras regis predictas et Capitalis Justiciarius curie illius assignabit sibi locum in eadem, ubi deinceps ille sedebit, et mox eum sedere faciet in eodem. Sciendum tamen tibi est, Princeps, quod justiciarius iste inter cetera tunc jurabit, quod justiciam ministrabit indifferenter omnibus hominibus coram eo placitantibus, inimicis et amicis, nec sic facere differet, eciamsi rex per litteras suas, aut ore

tenus, contrarium jusserit. Jurabit eciam, quod ex tunc non recipiet ipse ab aliquo, preterquam a rege fedum, aut pencionem aliquam, seu liberatam, neque donum capiet ab habente placitum coram eo, preterquam esculenta et poculenta, que non magni erunt precii. Sciendum eciam tibi est, quod justiciarius sic creatus, convivium, solempnitatemve, aut sumptus aliquos non faciet tempore suscepcionis officii et dignitatis sue; cum non sint illa gradus aliqui in facultate legis, sed officium solum illa sint et magistratus, ad regis nutum duratura. Habitum tamen indumenti sui in quibusdam ipse extunc mutabit, sed non in omnibus insigniis ejus. Nam serviens ad legem ipse existens, roba longa, ad instar sacerdotis, cum capicio penulato circa humeros ejus extendente, et desuper collobio cum duobus labelulis, qualiter uti solent doctores legum in universitatibus quibusdam, cum supra descripto birreto vestiebatur. Sed justiciarius factus, loco collobii, clamide induetur, firmata super humerum ejus dexterum, ceteris ornamentis servientis adhuc permanentibus, excepto quod stragulata veste, aut coloris depertiti, ut potest serviens, justiciarius non utetur, et capicium ejus non alia furrura quam menevera penulatur, capicium tamen servientis pellibus agninis semper albis duplicatur. Qualem habitum te plus ornare optarem, cum potestas tibi fuerit, ad decorem status legis, et honorem regni tui. Scire te eciam cupio, quod justiciarii Anglie non sedent in curiis regis, nisi per tres horas in die, scilicet, ab hora octavam ante meridiem usque horam undecimam completam; quia post meridiem curie ille non tenentur. Sed placitantes tunc se devertunt ad pervisum, et alibi, consulentes cum servientibus ad legem, et aliis consilariis suis. Quare justiciarii, postquam se refecerint, totem diei residuum pertranseunt studendo in legi-

bus, sacram legendo Scripturam, et aliter ad eorum libitum contemplando, ut vita ipsorum plus contemplativa videatur quam activa. Sicque quietam illi vitam agunt ab omni sollicitudine et mundi turbinibus semotam. Nec unquam compertum est, eorum aliquem donis aut muneribus fuisse corruptum. Unde et hoc genus gratie vidimus subsecutum, quod vix eorum aliquis sine exitu decedat, quod justis magne et quasi appropriate benediccionis Dei est. Michi quoque non minimi muneris Divini cencetur esse pensandum, quod ex judicum sobole, plures de proceribus et magnatibus regni hucusque prodierunt quam de aliquo alio statu hominum regni qui se prudencia et industria propria opulentos, inclytos, nobilesque fecerunt. Quanquam mercatorum status, quorum aliqui sunt qui omnibus justiciariis regni prestant divitiis, judicum numerum in milibus hominum excedat. Nam fortune, que nihil est, istud ascribi non poterit, sed Divine solum benediccioni fore, arbitror, tribuendum. Cum Ipse per Prophetam dicit, quod "generacio rectorum benedicetur." Et alibi de justis loquens Propheta, ait, quod "filii eorum in benediccione erunt." Dilige igitur, Fili Regis, justiciam que sic ditat, colit, et perpetuat fetus colencium eam. Et zelator esto legis, que justiciam parit, ut a te dicatur quod a justis scribitur, "Et semen eorum in eternum manebit."

Cap. LII.—*Princeps increpat dilaciones que sunt in Curiis Regis.*

Princeps. Unum jam solum superest, Cancellarie, declarandum, quo parumper adhuc fluctuat, inquietatur quoque mens mea; in quo si eam solidaveris, non amplius te questionibus fatigabo. Dilaciones ingentes, ut asseritur, paciuntur leges Anglie in processibus suis, plus quam leges

aliarum nacionum; quod petentibus nedum juris sui prorogacio est, sed et sumptuum quidem importabile onus, et maxime in accionibus illis, in quibus dampna petentibus non redduntur.

Cap. LIII.—*Dilaciones que sunt in Curiis Regis sunt necessarie et racionabiles.*

Cancellarius. In accionibus personalibus extra urbes et villas mercatorias, ubi proceditur secundum consuetudines et libertates earundem, processus sunt ordinarii, et quantaslibet dilaciones paciuntur, non tamen excessivas. In urbibus vero et villis illis, potissimum cum urgens causa deposcat, celeris ut in aliis mundi partibus fit processibus; nec tamen ut alibi ipsi nimium aliquando festinantur, quo subsequitur partis lesio. Rursus in realibus accionibus, in omnibus fere mundi partibus, morosi sunt processus, sed in Anglia quodammodo celeriores. Sunt quippe in regno Francie, in curia ibidem suprema que curia Parliamenti vocitatur, processus quidam qui in ea plus quam triginta annis pependerunt. Et novi ego appellacionis causam unam, que in curia illa inter Ricardum Heiron mercatorem Anglicum et mercatores alios pro transgrescione facta infra jurisdiccionem Curie illius agitata fuit, jam per decem annos suspensam fuisse, et adhuc verisimile non est eam infra annos decem alios posse decidi. Ostendit et michi dudum, dum Parisiis morabar, hospes meus processum suum in scriptis, quem in curia Parliamenti ibidem ipse tunc octo annos pro quator solidatis redditus, qui de pecunia nostra octo denarios non excedunt, prosecutus est, nec speravit se in octo annis aliis judicium inde obtenturum. Alios quoque nonnullos novi casus ibidem, hiis similes. Sicque leges Anglie non tantas, ut michi visum est, dilaciones sor-

ciuntur ut faciunt leges regionis illius. Sed revera, pernecessarium est dilaciones fieri in processibus omnium accionum, dummodo nimium ipse non fuerint excessive. Nam sub illis partes, et maxime pars rea, quam sepe sibi provident de defensionibus utilibus, similiter et consiliis, quibus alias ipsi carerent. Nec unquam in judiciis tantum imminet periculum quantum parit processus festinatus. Vidi nempe quondam apud civitatem Sarum, coram judice quodam, ad gaolam ibidem deliberandam cum clerico suo assignato, mulierem de morte mariti sui infra annum de interfeccione ejus attinctam, similiter et combustam. In quo casu licuit judici illi, usque post annum illum, arrettamentum sive disracionem mulieris illius respectuasse. Et post annum illum vidi unum de servientibus interfecti illius, coram eodem justiciario, de morte ejusdem magistri sui convictum; qui tunc publice fatebatur ipsummet solum magistrum suum occidisse, et magistram suam uxorem ejus tunc combustam innocentem omnino fuisse de morte ejus; quare ipse tractus et suspensus fuit. Sed tamen omnino, eciam in ipso mortis articulo, mulierem combustam, immunem a crimine illo fuisse ipse lugebat. O quale putandum est, ex hoc facto, conscientie discrimen et remorsum evenisse justiciario illi tam precipiti, qui potuit processum illum juste retardâsse? Sepius proh dolor! ipse michi fassus est quod nunquam in vita sua animum ejus de hoc facto ipse purgaret. Crebro enim in deliberacionibus judicia maturescunt; sed in accelerato processu, nunquam. Quare, leges Anglie essonium admittunt qualia non faciunt leges alie mundi universi. Nonne quam utiles sunt Vocaciones ad Warrantum? Auxilia de hiis, ad quos spectat revercio tenementorum qui in placitum deducunt, et qui habent evidencias eorundem. Auxilia eciam de coparticipibus, qui

reddent pro rata si tenementum comparticipi allottatum evincatur. Et tamen hec dilaciones sunt, sicut tu, Princeps alias nosti ex doctrina mea. Et dilaciones hiis similes leges alie non admittunt, neque leges Anglie frivolas et infructuosas permittunt inducias. Et si que in regno illo dilaciones in placitis minus accommode fuerint usitate, in omni parliamento amputari ille possunt, eciam et omnes leges alie in regno illo usitate cum in aliquo claudicaverint, in omni parliamento poterunt reformari. Quo recte concludi potest, quod omnes legis regni illius optime sunt, in actu vel potencia; quo faciliter in actum duci poterunt, et in essenciam realem. Ad quod faciendum, quociens equitas id poposcerit, singuli reges ibidem sacramento astringuntur solempniter prestito tempore recepcionis diadematis sui.

Cap. LIV.—*Leges Anglie optime sunt quas scire regibus expedit; tamen in confuso eas scire regibus sufficiet.*

Princeps. Leges illas, nedum bonas, sed optimas esse, Cancellarie, ex prosecucione tua in hoc dialogo certissime deprehendi. Et si que ex eis meliorari deposcant, id certissime fieri posse, parliamentorum ibidem formule nos erudiunt. Quo, realiter, potencialiterve, regnum illud semper prestantissimis legibus gubernatur, nec tuas in hac concionacione doctrinas futuris Anglie regibus inutiles fore conjicio, dum non delectet regere legibus, que non delectant. Fastidit namque artificem inepcio instrumenti, et militum ignavum reddit debilitas lancie et mucronis. Sed sicut ad pugnam animatur miles, cum nedum sibi prona sint arma, sed et magis cum in actibus bellicis ipse sit expertus, dicente Vegetio de re militari, quod "sciencia rei bellice dimicandi audaciam nutrit." Quia nemo facere

metuit quod se bene didicisse confidit. Sic et rex omnis ad justiciam animatur, dum leges quibus ipsi fiet, nedum justissimas esse agnoscit, sed et earum ille expertus sit formam et naturam, quas tantum in universali, inclusive, et in confuso, principi scire sufficiet, remanente suis judicibus earum discreta determinataque pericia et sciencia altiori. Sic equidem et Scripturarum divinarum periciam, ut dicit Vincencius Beluacensis in libro de Morali Institucione Principum, omnis princeps habere deberet; cum dicat Scriptura superius memorato, quod "vani sunt omnes, in quibus non est sciencia Dei." Et Proverbiorum XVI. scribatur, "Divinacio id est divina sentencia vel sermo divinus, sit in labiis regis, et tunc in judicia non errabit os ejus." Non tamen profunde, determinateve intelligere tenetur princeps Scriptuas sacras, ut decet sacre Theologie professorem; sufficit namque ei earum in confuso degustare sentencias, qualiter et periciam legis sue. Sic et fecerunt Carolus Magnus, Ludovicus filius ejus, et Robertus quondam rex Francie, qui hanc scripsit sequenciam "Sancti Spiritus adfit nobis gratia;" et quam plures alii, ut in XV. Capite libri predicti, Vincentius predictus luculenter docet. Unde et doctores legum dicunt, quod "Imperator gerit omnia jura sua in scrinio pectoris sui;" non, quia omnia jura ipse noscit realiter et in actu, sed dum principia eorum ipse percipit, formam similiter et naturam, omnia jura sua ipse intelligere censetur, que eciam transformare ille potest, mutare et cassare. Quo in eo potencialiter sunt omnia jura sua, ut in Adam erat Eva antequam plasmaretur. Sed quia, Cancellarie, ad legum Anglie disciplinatum michi jam conspicio sufficienter esse suasum, quod et in hujus operis exordio facere promisisti, non te amplius hujus pretextu sollicitare conabor; sed ob-

nixe deposco ut in legis hujus principiis, ut quondam incepisti, me erudias, docens quodam modo ejus agnoscere formam et naturam; quia lex ista michi semper peculiaris erit inter ceteras legis orbis, inter quas ipsam lucere conspicio, ut Lucifer inter stellas. Et dum intencioni tue, que ad collacionem hanc concitatus es, jam satisfactum esse non ambigo, tempus postulat et racio ut nostris colloquiis terminum conferamus, reddentes ex eis laudes Ei et gracias, qui ea incepit, prosecutus est, et finivet, Alpha et Omega quem dicimus, quem et laudet omnis Spiritus. Amen.

INDEX

OF

THE PRINCIPAL MATTERS TREATED OF IN THIS WORK.